

ENDANGERED SPECIES ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON FISHERIES AND WILDLIFE
CONSERVATION AND THE ENVIRONMENT

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

ENDANGERED SPECIES ACT REAUTHORIZATION—
H.R. 1027

MARCH 14, 1985

ENDANGERED SPECIES ACT AND NATIVE AMERICAN
RELIGIOUS PRACTICES

JUNE 11, 1985

CAPTIVE RAPTORS—H.R. 2767

JULY 10, 1985

Serial No. 99-10

Printed for the use of the Committee on Merchant Marine and Fisheries



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1985

53-387 O

COMMITTEE ON MERCHANT MARINE AND FISHERIES

WALTER B. JONES, North Carolina, *Chairman*

MARIO BIAGGI, New York
GLENN M. ANDERSON, California
JOHN B. BREAU, Louisiana
GERRY E. STUDDS, Massachusetts
CARROLL HUBBARD, Jr., Kentucky
DON BONKER, Washington
JAMES L. OBERSTAR, Minnesota
WILLIAM J. HUGHES, New Jersey
BARBARA A. MIKULSKI, Maryland
MIKE LOWRY, Washington
EARL HUTTO, Florida
W.J. (BILLY) TAUZIN, Louisiana
THOMAS M. FOGLIETTA, Pennsylvania
DENNIS M. HERTEL, Michigan
ROY DYSON, Maryland
WILLIAM O. LIPINSKI, Illinois
ROBERT A. BORSKI, Pennsylvania
THOMAS R. CARPER, Delaware
DOUGLAS H. BOSCO, California
ROBIN TALLON, South Carolina
ROBERT LINDSAY THOMAS, Georgia
SOLOMON P. ORTIZ, Texas
CHARLES E. BENNETT, Florida
THOMAS J. MANTON, New York

NORMAN F. LENT, New York
GENE SNYDER, Kentucky
DON YOUNG, Alaska
ROBERT W. DAVIS, Michigan
WILLIAM CARNEY, New York
NORMAN D. SHUMWAY, California
JACK FIELDS, Texas
CLAUDINE SCHNEIDER, Rhode Island
HERBERT H. BATEMAN, Virginia
JOHN R. MCKERNAN, Jr., Maine
WEBB FRANKLIN, Mississippi
THOMAS F. HARTNETT, South Carolina
GENE CHAPPIE, California
JIM SAXTON, New Jersey
SONNY CALLAHAN, Alabama
JOHN R. MILLER, Washington
HELEN DELICH BENTLEY, Maryland

EDMUND B. WELCH, *Chief Counsel*

BARBARA L. CAVAS, *Chief Clerk*

GEORGE D. PENCE, *Minority Staff Director*

SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

JOHN B. BREAU, Louisiana, *Chairman*

DON BONKER, Washington
JAMES L. OBERSTAR, Minnesota
THOMAS R. CARPER, Delaware
DOUGLAS H. BOSCO, California
ROBERT LINDSAY THOMAS, Georgia
THOMAS J. MANTON, New York
GLENN M. ANDERSON, California
GERRY E. STUDDS, Massachusetts
WILLIAM J. HUGHES, New Jersey
MIKE LOWRY, Washington
EARL HUTTO, Florida
DENNIS M. HERTEL, Michigan
ROY DYSON, Maryland
SOLOMON P. ORTIZ, Texas
CHARLES E. BENNETT, Florida
WALTER B. JONES, North Carolina
(*Ex Officio*)

DON YOUNG, Alaska
WILLIAM CARNEY, New York
JACK FIELDS, Texas
CLAUDINE SCHNEIDER, Rhode Island
HERBERT H. BATEMAN, Virginia
JOHN R. MCKERNAN, Jr., Maine
WEBB FRANKLIN, Mississippi
GENE CHAPPIE, California
JIM SAXTON, New Jersey
SONNY CALLAHAN, Alabama
JOHN R. MILLER, Washington
NORMAN F. LENT, New York
(*Ex Officio*)

G. WAYNE SMITH, *Staff Director*

JEFF CURTIS, *Counsel*

TIM SMITH, *Counsel*

ROD MOORE, *Minority Professional Staff*

CONTENTS

ENDANGERED SPECIES ACT REAUTHORIZATION

	Page
Hearing held March 14, 1985.....	1
Text of H.R. 1027.....	5
Statement of:	
American Farm Bureau Federation (prepared statement).....	175
American Petroleum Institute (prepared supplemental statement).....	176
Armstrong, Ms. Kit, chairman, Western Oil Gas Association, Sea Otter Task Force.....	85, 106
Prepared statement.....	110
Attenborough, David, trustee, World Wildlife Fund, and host, "The Living Planet".....	6
Barry, Donald J., Assistant Solicitor, Fish and Wildlife Service, Department of the Interior.....	14, 30
Bavin, Clark, Chief of Law Enforcement, U.S. Fish and Wildlife Service, Department of the Interior.....	14
Bean, Michael, chairman, Wildlife Program, Environmental Defense Fund.....	37
Prepared statement.....	41
Blair, William D., Jr., president of the Nature Conservancy (prepared statement).....	256
Bond, Frank, representative, North American Falconers Association.....	149, 159
Prepared statement.....	164
Breaux, Hon. John B., a U.S. Representative from the State of Louisiana.....	1
Burnham, William, vice president, Peregrine Fund, Inc.....	149, 154
Prepared statement.....	158
Colorado Water Congress (prepared supplemental statement).....	182
Colorado Water Conservation Board (prepared statement).....	185
Committee for Humane Legislation, Friends of Animals, Inc. (prepared statement).....	187
Davison, Dr. Robert, legislative representative, National Wildlife Federation.....	37, 65
Prepared statement.....	69
Environmental Defense Fund, Sierra Club, Trout Unlimited, Friends of the Earth, and Colorado Audubon Council (prepared joint statement).....	209
Fields, Hon. Jack, a U.S. Representative from the State of Texas.....	4
Fisher, Roland C., secretary-engineer, Colorado River Water Conservation District.....	178
Fitzgerald, John M., Washington representative, Endangered Wildlife Program, Defenders of Wildlife (prepared statement).....	189
Fraker, Mark A., Sohio Alaska Petroleum Co. (prepared statement).....	261
Fulton, Ms. Carol, executive director, Friends of the Sea Otter.....	85, 112
Prepared statement.....	115
Gilmore, Robert, Associate Director, Federal Assistance, U.S. Fish and Wildlife Service, Department of the Interior.....	14, 85, 142
Prepared statement.....	143
Gordon, William, Director, National Marine Fisheries Service, Department of Commerce.....	14, 21
Prepared statement.....	25
Haynes, Charles M., wildlife research biologist, Colorado Division of Wildlife.....	285
Jantzen, Robert, Director, U.S. Fish and Wildlife Service, Department of the Interior.....	14
Prepared statement.....	16

Statement of—Continued

	Page
Johnsen, Mrs. Niels, president, Garden Club of America	37, 75
Johnson, Hon. V.G., C.B.E., J.P., Cabinet Member for Development and Natural Resources, Government of the Cayman Islands (prepared state- ment).....	251
Lambertson, Ron, Associate Director, Wildlife Resources, U.S. Fish and Wildlife Service, Department of the Interior	149, 169
Prepared statement.....	169
Leape, James P., counsel, Wildlife Programs, Audubon Society.....	149
Prepared statement.....	151
Lent, Hon. Norman F., a U.S. Representative from the State of New York.....	4
Marcoux, Ron, Associate Director, Montana Department of Fish, Wildlife, and Parks.....	37, 56
Prepared statement.....	58
National Ocean Industries Association and the International Association of Geophysical Contractors (prepared statement).....	252
Natural Resources Defense Council, Native Plant Society of Oregon, New England Wild Flower Society, Waimea Arboretum and Botanical Garden, and Mrs. LaVerne R. Collard, Operation Wildflower Chairman, National Council of State Garden Clubs (prepared joint statement).....	254
Parsons, Richard M., Wildlife Coalition International (prepared state- ment).....	273
Pitts, Tom, coordinator, Colorado Water Congress special project on threatened and endangered species	37, 60
Prepared statement.....	63
Rebuck, Steven, representative, Save Our Shellfish	85
Prepared statement.....	87
Roe, Richard B., Director, Office of Protected Species and Habitat Conser- vation, National Marine Fisheries Service, Department of Commerce	14
Safari Club International (prepared statement).....	260
Schneider, Hon. Claudine, a U.S. Representative from the State of Rhode Island.....	2
Steele, Bruce, board of directors, California Urchin Divers Association.....	85
Western States Water Council (prepared statement).....	265
Wildlife Legislative Fund of America (prepared statement).....	276
Williams, Richard, executive secretary-treasurer, Save Our Shellfish.....	85
Williamson, Lonnie L., secretary, Wildlife Management Institute (pre- pared statement).....	277
Young, Hon. Don, a U.S. Representative from the State of Alaska.....	3
Zagata, Dr. Michael, manager, engineering ecological sciences, Tenneco, Inc.....	37, 52
Prepared statement.....	54
Zimmerman, Gerald R., executive director, Upper Colorado River Com- mission (prepared statement).....	264
Additional material supplied:	
Behnke, R.J., and D.E. Benson: Report entitled "Endangered and Threat- ened Fishes of the Upper Colorado River Basin"	215
Crowcroft, Dr. Peter: Article from "Animals Canada," spring 1983, enti- tled, "For Cats' Sake"	306
Pitts, Tom: Resolution passed by Colorado House and Senate.....	62
Steele, Bruce A.: Sea Urchin Fishery Synopsis, by CUDA	91
Swint, Win: California Abalone Fishery Synopsis.....	98
Communications submitted:	
Brown, Locky: Letter of March 8, 1985, to Congressman John Breaux.....	106
Cuneo, John F., Jr.: Letter of March 25, 1985, to Richard Parsons.....	275
Gordon, William G.: Letter of October 4, 1983, to David C. Russell.....	253
Kepner, Kathleen: Letter of August 4, 1976, to Lynn A. Greenwalt with enclosure	281
O'Meara, J.W.: Letter of March 15, 1985, to Hon. John Breaux.....	288
Overton, J. Allen, Jr.: Letter to Hon. John B. Breaux of March 14, 1985	283
Painter, Mary M.: Letter of March 16, 1985, to Hon. John Breaux	291
Parnell, Jack C.: Letter of April 5, 1985, to Hon. John Breaux	299
Parsons, Richard M.: Letter of April 10, 1985, to Hon. John Breaux with enclosure	304

Communications submitted—Continued

	Page
Seastrand, Eric: Letter of March 8, 1985, to Steve Rebusk.....	105
Senner, Stanley E.: Letter of April 29, 1985, to Hon. John B. Breaux	308
Sherrod, Steve K.: Letter of March 10, 1985, to Hon. John Breaux.....	279
Strickland, Ted: Letter of March 28, 1985, to Hon. John Breaux with enclosure	294
Swint, Win: Letter of March 6, 1985, to Congressman John Breaux	98
Thomson, Kathleen Kepner: Letter of March 12, 1985, to Subcommittee on Fisheries and Wildlife Conservation and the Environment	280
Underwood, Blade: Letter of March 8, 1985, to Hon. John Breaux.....	105
Wagner, Robert O.: Letter of April 17, 1985, to Hon. John Breaux.....	302
West, Tony: Letter of March 5, 1985, to Hon. John Breaux	104

ENDANGERED SPECIES ACT AND NATIVE AMERICAN RELIGIOUS PRACTICES

Hearing held June 11, 1985.....	311
Statement of:	
Barry, Donald J., Assistant Solicitor, Fish and Wildlife Division of Conservation and Wildlife, Department of the Interior	312
Bavin, Clark R., Chief, Division of Law Enforcement, U.S. Fish and Wildlife Service, Department of the Interior.....	312
Bean, Michael J., chairman, Wildlife Program, Environmental Defense Fund.....	420
Prepared statement.....	422
Breaux, Hon. John B., chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment.....	311
Endreson, Douglas, attorney, Sonosky, Chambers & Sachse, on behalf of the Devils Lake Sioux and Assiniboine and Sioux Tribes of Fort Peck Reservation	406
Prepared statement.....	408
Frank, Bill, Jr., chairman, Northwest Indian Fisheries Commission	333
Prepared statement.....	335
Garcia, David L., spiritual leader, Acoma, NM.....	329
Garcia, Merle L., governor of the Pueblo of Acoma, NM.....	329
Harjo, Suzan Shown, executive director, National Congress of American Indians.....	339
Prepared statement.....	340
Hayden, Wesley F., legislative counsel, International Association of Fish and Wildlife Agencies (prepared statement).....	428
Horn, Marian, Acting Solicitor, Department of the Interior.....	312
Prepared statement.....	315
Interreligious Faith Community representatives (prepared statement).....	432
Lenzini, Paul, legal counsel, International Association of Fish and Wildlife Agencies, on behalf of Wesley F. Hayden, legislative counsel.....	427
Navajo Nation (prepared statement).....	434
Pena, Gilbert M., chairman, Pueblo Tribes of New Mexico.....	410
Sanchez, Juanico, Caciqi Tribal leader	329
Sidney, Ivan, chairman, Hopi Tribe	336
Prepared statement.....	337
Tomchee, James, president, Native American Church of Navajoland, Inc. (prepared statement).....	435
Vollman, Tim, Associate Solicitor, Division of Indian Affairs, Department of the Interior.....	312
Wallenstrom, Rolf L., Associate Director, Federal Assistance, U.S. Fish and Wildlife Service, Department of the Interior.....	312
Additional material supplied:	
Harjo, Suzan Shown:	
Excerpt from "American Indian Religious Freedom Act Report"	351
Excerpt from hearing before House Committee on the Judiciary of June 10, 1982	356
Interior Department:	
Lifespan of the bald eagle.....	327
Communications submitted:	
Chino, Tony B.: Letter of June 5, 1985, to Hon. John Breaux.....	331
Garcia, Merle L.: Letter of July 18, 1985, to Hon. John B. Breaux	454
Garcia, Merle L.: Letter of May 28, 1985, to Hon. John B. Breaux.....	332
Garcia, Raymond: Letter of July 17, 1985, to Congressman Breaux	449

VI

Communications submitted—Continued

Harjo, Suzan Shown:	Page
Letter of May 1, 1985, to Hon. John B. Breaux	347
Letter of May 28, 1985, to Hon. Donald Paul Hodel	342
Letter of June 10, 1985, to Clark R. Bavin	344
Jackson, Zane: Letter of July 3, 1985, to Chairman John Breaux	439
Jim, Roger, Sr.: Letter of June 11, 1985, to Hon. John Breaux	437
Martinez, Harry L., and nine others: Letter of July 16, 1985, to "Sirs"	445
Rainbow Kiva Leaders: Letter of July 16, 1985, to Congressman John Breaux	443
Sanchez, Juanico, and 15 others: Letter of July 18, 1985, to Congressman John B. Breaux	451
Wedill, Don: Letter of July 19, 1985, to Congressman Breaux	456

CAPTIVE RAPTORS

Hearing held July 10, 1985	459
Text of H.R. 2767	582
Statement of:	
Berry, Robert, president, North American Raptor Breeders' Association	476
Prepared statement	478
Bond, Frank, North American Falconers Association	513
Prepared statement	516
Breaux, Hon. John B., chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment	459
Broberg, Jeffrey, citizen from Lafayette, LA	503
Prepared statement with Erica Broberg	507
Cade, Dr. Tom, professor of ornithology, Cornell University, and president, the Peregrine Fund, Inc.	497
Prepared statement	499
Lambertson, Ronald, Associate Director for Wildlife Resources, U.S. Fish and Wildlife Service, Department of the Interior	461
Prepared statement	463
Leape, James P., counsel for wildlife programs, National Audubon Society	541
Prepared statement	544
Lent, Hon. Norman F., a U.S. Representative from the State of New York	460
Senner, Stanley E., executive director, Hawk Mountain Sanctuary Association	536
Prepared statement	539
Additional material supplied:	
Cade, Dr. Tom: Clarification of a response given at the hearing	550
Interior Department: Release of birds into the wild	472
Shor, Williston: Important errors of fact found in the statement made July 10, 1985, by James P. Leape for the National Audubon Society on the raptor exemption	579
Communication submitted:	
Berry, Robert B.: Letter of March 12, 1985, to Hon. John B. Breaux	568
Cade, Tom J.: Letter of December 22, 1977, to Hon. Robert L. Herbst	552
Hair, Jay D.: Letter of May 10, 1985, to Hon. John B. Breaux	576
Bristow, Bud: Letter of July 8, 1985, to Hon. Walter B. Jones	577
Johnson, Gene: Letter of April 29, 1985, to Hon. John B. Breaux	572
Johnson, Lisa: Letter of April 29, 1985, to John B. Breaux	573
Sharke, Janet E.: Letter of May 10, 1985, to Hon. Bill Green	574
Shor, Williston: Letter of July 21, 1985, to Hon. John B. Breaux	578

THE ENDANGERED SPECIES ACT REAUTHORIZATION

THURSDAY, MARCH 14, 1985

**HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FISHERIES AND WILDLIFE
CONSERVATION AND THE ENVIRONMENT,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, DC.**

The subcommittee met, pursuant to call, at 9 a.m., in room 1334, Longworth House Office Building, Hon. John B. Breaux (chairman of the subcommittee) presiding.

Present: Representatives Breaux, Bosco, Lowry, Hertel, Bennett, Schneider, McKernan, and Lent.

Staff present: Jeffrey A. Curtis, Paul E. Carothers, Geraldine A. Fitzgerald, Thomas Melius, Ed Welch, Jacquelyn M. Westcott, John Dentler, and George D. Pence.

OPENING STATEMENT OF HON. JOHN B. BREAU, A U.S. REPRESENTATIVE FROM THE STATE OF LOUISIANA

Mr. BREAU. The subcommittee will please come to order.

We have a big crowd this morning, and we have crowded conditions, so I hope everybody can try to make the best of it. We welcome all of our people and all of our guests, as well as the panels that will be with us on the Endangered Species Act.

Today's hearing will be on the reauthorization of the Endangered Species Act. The current Endangered Species Act was enacted in 1973 to address the concern of scientists and naturalists that the rate of species extinctions was increasing rapidly and a number of very visible species, such as the bald eagle and the brown pelican, were threatened with extinction. Although the publicity surrounding endangered species has focused on the more glamorous species such as the bald eagle, scientists are perhaps more concerned about the loss of biological diversity caused by the increased rate of extinction of both plants and animals. They point to the loss of genetic traits that could provide advances in medicine or agriculture. They argue that, while it is inevitable that we will continue to manipulate and develop natural resources, the first rule of intelligent tinkering is to save all the pieces.

The act, which has been amended several times, most recently in 1982, requires the Departments of Commerce and Interior to study wildlife and plant species that fall within their jurisdiction to determine if they are in danger of extinction. Species determined to be in such danger are placed on the endangered species list. Species

likely to become endangered unless protective actions are implemented are listed as threatened. In 1982 the Act was amended to require the agencies to respond to private citizen petitions to list species in a timely manner.

Once listed, a species is protected from taking and eligible for other protective measures provided under the provisions of the act. Perhaps the most important provision, and certainly the most controversial, is section 7 of the act, which requires Federal agencies, prior to undertaking any Federal activity, to consult with the Commerce or Interior Departments to insure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species. This is the section that brought about the famous controversy involving the snail darter and the Tellico Dam. Although section 7 has been amended several times to improve coordination among agencies and provide for Cabinet-level review of irreconcilable conflicts between endangered species and Federal projects, it is still one of the strongest provisions in the body of wildlife conservation law.

Since its enactment, there have been both successes and failures. The bald eagle has come back, the whooping crane has made progress, and the brown pelican has recently been removed from the endangered list on the east coast. There have also been failures. There are only a handful of dusky seaside sparrows left, all in captivity and all, unfortunately, male. The red wolf is probably extinct in the wild, although they are breeding in zoos.

When we last considered the act in 1982, I was impressed by the willingness of both environmental and development interests to compromise and work toward making the Act more effective and more workable. I think we all agree the end product was a reasonable set of amendments to the Act that, we hope, made it work better for all concerned.

I hope we can approach this reauthorization with the same commitment to a rational process where we concentrate on the facts and resolve conflicts with patience and compromise. If we do this, I am certain we can achieve the consensus on this issue that we have in the past.

We are very fortunate to have as our first witness, David Attenborough.

Before I introduce Mr. Attenborough, do the members have any comments? Mr. Bosco or any other members?

OPENING STATEMENT OF HON. CLAUDINE SCHNEIDER, A U.S. REPRESENTATIVE FROM THE STATE OF RHODE ISLAND

Mrs. SCHNEIDER. Mr. Chairman, I would like to ask unanimous consent that my opening statement be included in the record. Regrettably, because of a conflicting hearing, I must leave early, and if I might also include some questions, I would appreciate it.

Mr. BREAU. Certainly, without objection, your remarks will be made a part of the record.

[The statement of Hon. Claudine Schneider follows:]

STATEMENT OF HON. CLAUDINE SCHNEIDER, A U.S. REPRESENTATIVE FROM THE STATE OF RHODE ISLAND

The Endangered Species Act is one of the cornerstone environmental laws of this country. Its passage in 1973 marked the real beginning of a national commitment to slowing and ultimately reversing the world-wide increase in extinction of species. Despite the efforts made under the Endangered Species Act, extinction is occurring more rapidly than ever. More than half the animal extinctions of the last 2,000 years have occurred since 1900. It is estimated that an average of one animal species was lost per decade during the 350 years leading up to the mid-twentieth century, but that currently according to the International Union for the Conservation of Nature and Natural Resources (IUCN), one animal species or subspecies is lost per year, principally due to human alterations of habitat. And the rate is increasing.

The requirements of the Endangered Species Act are a good mechanism for protecting species in danger of extinction in this country. It is of course difficult for us to stimulate protection in other parts of the world, where the greatest numbers of species are threatened, particularly in tropical forests. We need to think more creatively about ways the United States can encourage the protection of critical habitat in other countries.

Even in the U.S., which has given the greatest resources to species protection of any country, species are still disappearing, and government inaction and delay must share some blame. We are hearing testimony today about the severe inadequacy of the Office of Endangered Species' recovery plan efforts. An endangered species program without adequate recovery resources is likely to become a paper program only, and we may be moving down that path. I hope this committee will give serious attention to the needs of the recovery program as we take steps to improve the situation.

Finally, I want to express a major concern about the reauthorization process. Every two or three years, this committee and Congress look at this act and tinker with the original concept a little more. What was once a simple, straightforward process of identification and protection for endangered species has now become circumscribed with exceptions and adjustments. Every time we reauthorize this legislation another set of "user" groups comes before us to complain about the problems they are having because of the Endangered Species Act. I am sure that these concerns are very real, but we must not lose sight of what is at stake here. The very survival of this planet depends in large part on maintaining species diversity. We cannot afford to abandon our ultimate goal, the assurance that humanity will not erase species from the world.

We are continually asked to bend and adjust the act so that some development or user interest can proceed with its plans. I know it is difficult to resist these seemingly vital immediate needs, but we must, or in a few years, this great legislation will be reduced to mere fragments of its former whole. We need to incorporate into our thinking what David Ehrenfeld of Rutgers has called "the Noah Principle." When Noah brought into his ark representatives of every living creature on earth, he did so without any economic justification, but on the ethical principle of the rightness of their survival. The implications of the Noah story are that mere existence carries with it the inherent right to survival, notwithstanding other values. Noah seemed to have a knowledge gap, however, when it came to plants, but perhaps we can carry on his principle to encompass the flora of the world as well as the fauna.

Mr. BREAUX. I would also just say that, by unanimous consent, we have statements for the record submitted by Congressman Young, Congressman Lent, and Congressman Fields that will be made part of the record.

[The statements of Hon. Don Young, Hon. Norman F. Lent, and Hon. Jack Fields follow:]

STATEMENT OF HON. DON YOUNG, A U.S. REPRESENTATIVE FROM THE STATE OF ALASKA

Mr. Chairman, I am pleased to join you today as we begin the reauthorization of the Endangered Species Act of 1973.

As you know, this act is among the world's strongest laws in providing a multi-faceted approach for the protection of endangered species. During its history, the act has been modified several times to provide a balance between species protection and needed development projects. I think all of us agree that the goals of the act are indeed noble. I would hope, though, that if this balance needs further review, we do

so in a manner of compromise, to develop legislation that will result in a strong, effective and rational program to protect endangered species.

I want to welcome the witnesses and assure them that I will listen carefully to what they have to tell us.

STATEMENT OF HON. NORMAN F. LENT, A U.S. REPRESENTATIVE FROM THE STATE OF NEW YORK

Mr. Chairman, I am pleased to join with you as we begin the reauthorization of the Endangered Species Act of 1973.

Our purpose today is to here testimony on legislation that would extend the Endangered Species Act of 1973 through Fiscal Year 1988. The act is among the world's strongest laws in preventing species extinction. It does so through a variety of methods designed to bring species back to a point where protection is no longer needed. These include: listing as endangered or threatened, designation and acquisition or critical habitat, trade controls, state/Federal and international cooperation, and the regulation of Federal agency activities.

Under the latter provision, such agencies are required to use their authorities to conserve endangered and threatened species and to ensure that their actions do not jeopardize the continued existence of a listed species or destroy or adversely modify critical habitats. This requirement is carried out through interagency consultation which is intended to identify reasonable development alternatives that do not conflict with species conservation.

This legislation has been amended over the years to speed up the listing process of species specifically concerning the determination of critical habitat.

Our intent is to develop legislation that will protect species from direct and indirect impacts that could eventually cause extinction. The Endangered Species Act of 1973 is strong and maturing, it's been streamlined and improved over the years, and hopefully our efforts today will continue with this process.

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM THE STATE OF TEXAS

Mr. Chairman, as a cosponsor of H.R. 1027, I am pleased that you have scheduled this timely hearing to discuss the need to reauthorize the Endangered Species Act.

This is the fourth time that this Subcommittee has considered legislation to extend this landmark environmental law.

First enacted in 1973 to implement the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the importance of the Endangered Species Act has grown considerably over the years.

I hope that today's hearing will be just the first step in a successful effort by the Congress to reauthorize this important law for an additional three years.

In my State of Texas, which adopted its own Endangered Species Act in 1973, we have witnessed the positive effects that Federal and State statutes have had in providing vital protection to a number of wildlife species.

One of the best examples of this protection has been the miraculous resurgence from the brink of extinction of the stately whooping crane.

Today, more than half of the world's 137 whooping cranes live at least part of the year in the Aransas National Wildlife Refuge which is northeast of Corpus Christi, Texas, on the Gulf of Mexico.

From their all-time low of 20 in 1941, the whooping cranes' survival is one of the remarkable achievements of the Endangered Species Act. I am convinced that without this law, we would have lost forever a variety of wildlife species, including the whooping crane, the peregrine falcon, the bald eagle, and perhaps even outside the State of Alaska, the grizzly bear.

As a Member of Congress, I believe one of our primary goals should be to preserve natural and wildlife resources for future generations. By reauthorizing the Endangered Species Act, we will ensure that millions of people will have an opportunity to see majestic whooping cranes alive in their winter refuge in the State of Texas.

Mr. Chairman, I am pleased to join with you in this reauthorization effort and look forward to receiving the testimony of our distinguished witnesses. Thank you, Mr. Chairman.

[A copy of the bill follows:]

99TH CONGRESS
1ST SESSION

H. R. 1027

To authorize appropriations to carry out the Endangered Species Act of 1973 during fiscal years 1986, 1987, and 1988.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 1985

Mr. BREAUX (for himself and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To authorize appropriations to carry out the Endangered Species Act of 1973 during fiscal years 1986, 1987, and 1988.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 15 of the Endangered Species Act of 1973 (16
4 U.S.C. 1542) is amended—

5 (1) by striking out “and 1985” each place it ap-
6 pears in subsections (a), (b), and (c) and inserting in
7 lieu thereof “1985, 1986, 1987, and 1988”; and

8 (2) by striking out “fiscal year 1985,” in subsec-
9 tion (d) and inserting in lieu thereof “each of fiscal
10 years 1985, 1986, 1987, and 1988;”.

Mr. BREAUX. We are very fortunate, as I originally stated, to have as our first witness, David Attenborough, the noted author, cinematographer, and host of the PBS program "The Living Planet." I want to commend Mr. Attenborough on the wonderful way in which his programs educate people about natural resources. What I find particularly intriguing besides the photography is the way in which he integrates humans into the programs. I also want to commend the Mobil Oil Co. for its sponsorship of this program. Without their support, this program would not be available to us.

We had the pleasure also of meeting with David at breakfast this morning, and I am very impressed with the manner in which he approaches those concerns in which all of us share.

So, David, we are very pleased to have you with us. Mr. Attenborough, if you would like to make some comments, we would be pleased to hear from you.

STATEMENT OF DAVID ATTENBOROUGH, TRUSTEE, WORLD WILDLIFE FUND, AND HOST, "THE LIVING PLANET"

Mr. ATTENBOROUGH. Mr. Chairman and members of the subcommittee, as a citizen of Great Britain and an international trustee of the World Wildlife Fund, I am indeed honored to appear before you to help, if I can, in your deliberations on the Endangered Species Act.

For the past 30 years, I have had the very great good fortune to spend much of my time traveling in the wilder parts of the world, making films about natural history. The latest of them, as you just mentioned, is a series called "The Living Planet," which is at the moment being shown throughout the United States on the Public Broadcasting System. These journeys have taken me to some of the remotest parts of the Earth, from the central Sahara to lonely islands in the Pacific. Yet, paradoxically, the more I travel in little-populated regions, the more plain it is to me how greatly mankind in the densely populated parts of the world depends on the animals and plants of the wilderness.

Of course, we all recognize that without plants, human beings would die. Without plants we have nothing to eat. Even when we eat meat, we are eating plants at one remove. It is less often realized that our present food plants, unchanged, will not continue to provide the ever growing population of the world with all that it needs. The particular strains of food plants upon which we depend are extraordinarily few. Seventy-two percent of the potatoes grown in the United States belong to only four varieties. All the peas grown here come from just two. Just four varieties of wheat produce three-quarters of all the crop grown on the Canadian prairies, and a single variety takes up more than half of that vast area. These cultivated strains of wheat, peas, and potatoes, however, have to be changed every decade or so to keep them free from disease. If one such disease were to get hold, immense areas could be devastated and many people would face starvation. To produce such strains, plant breeders need new genetic resources that come from wild species of grasses, potatoes, and peas. Only recently, a new species of corn was discovered in Mexico that is not only resistant to several viral diseases, but is perennial, so it might be the

means of producing a new disease-resistant variety of corn that will grow year after year and need less care than those that we cultivate at present. So it is essential that wild species related to our food plants should continue to flourish in the wild and that the wildernesses that might harbor them should not be destroyed.

But plants provide us with many products other than food. We use them for timber, in construction, and for paper. Until now, that has meant cutting down trees; but recently a wild hibiscus in Kenya called kenaf has been discovered to produce excellent fiber for paper mills in a single season, instead of taking the 15 years or more that pine trees need to reach commercial size. A wildflower from the Mediterranean region called crambe yields chemicals that can perform the difficult job of lubricating jet aircraft engines. And the number of drugs and medicines produced from plants is vast. Approximately 40 percent of the prescriptions dispensed from pharmacies here in the United States are directly based on plant products. A small plant, a periwinkle from Madagascar, is now known to produce one of the best cures we have for certain types of cancer. In short, the practical value to be derived from wild plants is incalculable. And that is literally true. We have made no proper survey of the plant kingdom from the point of view of their use as drugs or food. We have not even discovered or named all the plants in the world. And yet, all over the world, we are destroying wild areas and with them species of plants that grow only there. Conservation is sometimes represented as being the enemy of development. On the contrary. Without conservation, we will have nothing to develop.

Similarly, many wild animals have a value to us that we still do not properly appreciate. We have only recently discovered that a kind of shell-less sea snail living off the coast of California contains a chemical that is capable of reducing blood pressure. We now realize that species of antelope that evolved over millions of years to crop the relatively poor grasslands of parts of Africa or Central Asia are more efficient at turning such meager pasturage into meat than imported domesticated versions of the cattle that evolved in the lush environments of Europe. The kouprey, a wild cow from the tropical forests of Cambodia, now seems to be one of the few species of cattle to be resistant to one of the most devastating livestock diseases. Today we are beginning to master the techniques of genetic engineering, and it may well be that the vast and still as yet uncataloged diversity of life will prove to be the most valuable resource that this planet has to offer us.

It is not only single species that are important to the continued welfare of mankind. Animals and plants live in complex, interdependent communities that function as units; and these too are essential for the well-being of life on Earth. The tropical rain forest is a crucial example of this. It is a crucial element in maintaining the oxygenation of the world's atmosphere and the pattern of regular rainfall. The soils that feed the Earth's 4.8 billion people are created and kept fertile by specialized communities of living organisms. Our water would be a polluted, toxic brew were it not for the countless plants and micro-organisms that, by serving their own needs, turn natural and human-created wastes into harmless and even beneficial substances. Without a cloak of vegetation, the

land may be scourged by erosion, the risk of disastrous flooding increases sharply, and droughts become more frequent and damaging. The terrible drought that has killed and is still killing hundreds of thousands of people in Ethiopia and other parts of the African Sahel is not merely a natural phenomenon. It has struck a land whose people have destroyed more than half the natural vegetation in the last few decades. We mismanage our landscapes at our own peril. We simply cannot do without the ecosystem services provided by life on Earth.

But you may well ask—what has this got to do with the whooping crane, the Florida manatee, the bald eagle, and the other animals and plants that the Endangered Species Act is designed to protect? Well, in the first place, each of those creatures is an indicator—and a very conspicuous one—of the well-being of one particular habitat. Their increasing scarcity is one certain sign that a whole community of plants and animals, large and small, is in danger of being lost. The whooping crane is endangered because the whole character of the aquatic systems along which it lives is being changed by man. The Florida manatee is disappearing because the increased traffic of small power boats is not only disturbing them but churning up the waterways and altering their whole ecological structure. So if you save these large and dramatic creatures in the wild, you are likely to save whole groups of other species which themselves may have practical value to mankind which we do not, at the moment, even suspect.

But if someone could demonstrate that there was no practical value whatsoever, for food or medicine or anything else, to be gained from such creatures, would that mean that we would be justified in allowing them to be shot or letting them from sheer carelessness simply disappear into extinction? Of course not. Millions—and I am among them—would argue that these creatures have a value to mankind that far transcends the merely practical. They and the other creatures that live with them, together with the landscape they inhabit, are part of the natural treasures of this great country, part of the birthright of its citizens. They are a source of scientific wealth as well of esthetic delight. To destroy them and to eliminate their habitat is to inflict a major robbery on the people of this country and the generations that follow, a robbery that can never be restored or made good. Once a species is extinct, it is lost forever. How extraordinary it would seem should the citizens and Government of this great country decide that every single corner of it must be surrendered to man's use, that no part of it should be allowed to survive as home for creatures that can live nowhere else, if man—who can live anywhere and is the most ingenious exploiter the world has seen—should decide to lay a claim.

Every time I visit New York and go to the American Museum of Natural History, I read on the marble walls of the entrance hall, in letters of bronze, sentences that could have come from the lips of the most ardent and vigorous conservationist alive today, for example:

“* * * The Nation behaves well if it treats its natural resources as assets which it must turn over to the next generation increased and not impaired in value * * *”

Those words were, in fact, spoken about 100 years ago by Theodore Roosevelt. They are a reminder to me that this country, the United States, has always been a leader in the conservation movement. It was here that the concept of the national parks was first recognized and here that they were first created. It was here that the ethics of conservation were first formulated. And now, today, it is here that the rest of the world looks for leadership in conservation matters. The Endangered Species Act is a courageous national statement that Americans care about their magnificent land and its wealth of living resources. And it clearly acknowledges the U.S. international standing in these matters. The act allows experts from the U.S. Government agencies to give advice and training to conservationists from overseas. As human populations grow and the ecological crisis spreads and intensifies throughout the world, that help and expertise has never been more sorely needed. The act makes the United States a party to the Convention on International Trade in Endangered Species of Wild Flora and Fauna—CITES for short—the strongest legal means available to the world community to protect wildlife that is traded internationally. It also commits this country to the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. This convention was set up largely because many animals are no respecters of national boundaries, but migrate from one country to another; it is little use to protect them in Louisiana and North Dakota if they are going to be shot on their wintering grounds far to the south in Latin America—and vice versa.

The global significance of the Endangered Species Act goes far beyond these international agreements. What the United States, the recognized world leader of conservation does, is carefully watched—and duplicated by many other nations as best they can. If this country were suddenly to lessen its commitment to the welfare and survival of its wildlife, what hope would other less wealthy countries have of persuading their government and their people to conserve and protect, particularly when pressing short-term decisions to spend money and allocate land are much harder to take there than they are here.

The act, excellent though it is, has not, however, as I understand it, achieved here what its original supporters hoped it would when it was first adopted. Twelve years of administering it have shown, not surprisingly, that there are some aspects that ought to be improved. Adding species to the list of those protected is taking so long that in some instances species have diminished to danger point or even vanished entirely before they could be given legal protection. Plants, even now, do not get as effective safeguards as animals. Marine species also need more protection.

I do not doubt that someone will demonstrate conclusively that such changes would cost money. I am aware that the United States is struggling with huge budget deficits, though I doubt that the economic climate is as harsh as it is in my country. Everyone knows that your farmers are suffering, that your commercial fishermen are beset with problems, that your poor are dispirited. Yet as you sort out your spending priorities and your economy regains its momentum, you will be able to help such people regain their economic productivity and independence. But if help and protection is taken

away from your endangered wildlife, there could be no recovery. Extinction is a one-way process. I speak for conservationists everywhere in asking you to do everything in your power to renew and strengthen the act that has been an inspiration to people the world over. All the inhabitants of the living planet will thank you for it.

Mr. BREAUX. Mr. Attenborough, thank you very much for your presentation. Not only are you a world-renowned cinematographer, you are also a hell of a writer. I think it certainly gives those of us who are concerned about endangered species a strong argument for justifying actions in supporting the Endangered Species Act.

I am wondering about this: Like I said this morning, you are the only person I know who has traveled around the world more than Members of Congress. What type of support do you think there is for the Endangered Species Act in other parts of the world, in the sense of the effort that the United States is making? In your travels, do you find people are supportive and are willing to make the economic sacrifices that are sometimes required in order to support this type of a program?

Mr. ATTENBOROUGH. Yes, I think so. One of the valuable things about this act is that it integrates a whole series of actions that have to be taken about conservation in one act. It recognizes that not only must you protect individual species, but you also have to protect the environment, in which they live. Furthermore, that we must also become internationally involved in worldwide protective actions if we are to save the wildlife of the world.

Bringing together all these aspects of conservation into one act is an excellent example for many of us who have been tackling the job in a rather more piecemeal way. Of course, the details of the act are tailored to this country. Many other countries simply do not have the ability to support wildlife conservation to the degree that you can. So much of the detail cannot apply to smaller countries.

But what is of overwhelming importance—and I really cannot underline it too much—is the demonstration that the act represents the determination of the people of the United States to look after their environment. This concern and, if I may say so, this wisdom made apparent by the act, has the most powerful influence in the world of conservation overseas. That is why it is so important for the international community that this act should be seen to be the considered will of the American people, and that it is a strengthened act and not a diminished act.

Mr. BREAUX. I have heard some critics of these efforts say that many species will go into extinction anyway, and why should we be spending so much time and effort trying to delay what they say must be the inevitable. Do you have any comments on that?

Mr. ATTENBOROUGH. It is absolutely true that the world is in change. That has always been so. Lakes have filled up, grass lands have turned to desert, mountains have risen, volcanoes have erupted, and species have become extinct over a geological period of time.

But the dinosaurs, of course, disappeared over several million years, a far longer period than man himself has existed. But we are creating changes which are causing extinctions at, in geological terms, the speed of light.

In almost every instance, the changes that mankind is wreaking on the planet are changes from richness to poorness, from fertility to sterility, from abundance to paucity. Man is turning rich grass-land into desert where very few things grow. He is cutting down the tropical rain forest, the richest treasure of the animals and plants the world has ever seen, and turning it into stony soil-eroded wasteland.

He is pouring refuse and chemical wastes into lakes and rivers and reducing calamitously the variety of animals and plants that can live there. We are only just beginning to realize, as I suggested in my statement, that the biological diversity of animals and plants in this world represents an enormous untapped wealth from practical and scientific as well as esthetic points of view. It is the biological diversity of the planet that we should be maintaining.

Mr. BREUX. Thank you very much.

Let me ask if any other members have questions.

Congressman Lent from New York.

Mr. LENT. Thank you, Mr. Chairman.

I have no questions, Mr. Chairman, but I do want to lend my support to the chairman's statement to Mr. Attenborough. We sincerely thank you for your generosity and your time in coming here and giving us such an inspirational message as we begin the reauthorization process of the Endangered Species Act. Thank you very much for being here. You have our assurances on the minority side that we are going to do the very best we can to strengthen this act.

Mr. BREUX. Are there any questions from members on this side?

Congressman Lowry of Washington.

Mr. LOWRY. Thank you, Mr. Chairman, and thank you, Mr. Attenborough.

On page 11 of your testimony, you make the statement that adding species to the list is taking so long that sometimes, by the time they get added to the list, it is too late.

Do you have suggestions as to what could be done about that?

Mr. ATTENBOROUGH. I can only speak from experience in my own country where we have similar problems. It is, of course simply a question of money. You have to have enough staff to survey in a correct manner and bring the issue before the appropriate authorities with sufficient expedition to make it happen quickly. In my experience, in my country, that means staff and, therefore, money.

Mr. LOWRY. Do you know of any country that has that sort of dedicated funds for that purpose?

Mr. ATTENBOROUGH. Those of us who have such acts as this, all have dedicated funds. The problem is that the funds are not big enough.

Mr. LOWRY. The funds go into the General Treasury; they are not earmarked for specific items?

Mr. ATTENBOROUGH. You mean, do I know of funds which are specifically raised to support Government agencies to do so?

Mr. LOWRY. Right.

Mr. ATTENBOROUGH. It would be a marvelous thing were there to be some levy put on some particular product that would automatically go to a State organization to look after its wild creatures. But that is a matter of internal accounting which perhaps I should not comment on.

Mr. LOWRY. Thank you for that. Relative to the protection of the species, how important is habitat preservation and the disappearance of habitat, and how much are we doing to really address the question of habitat?

Mr. ATTENBOROUGH. When 25 years ago the World Wildlife Fund was instituted and the issue of conservation of species became formalized to that degree, a lot of us working for the cause thought that the problem was just to make sure that this particular creature did not disappear forever. Yet the more we worked, the more we realized that a Sumatran rhinoceros sitting in a concrete pit in a zoo was not exactly what Sumatran rhinoceroses are about. What they are about is a population of creature living in a particular kind of jungle together with all the other mammals and the plants, the birds, the reptiles, and the insects that go with it. This is the true jewel of the universe. Even if you did succeed in putting such a rhinoceros into a concrete pit, the business of actually getting calves from it, is so unpredictable that you may not save it from extinction anyway.

So slowly the Wildlife Fund has realized that if it is to conserve species it has to support conserve habitat, but more than that, that habitat with its full range of species is what we should be conserving anyway.

Mr. LOWRY. That is, of course, talking about real dollars. We are competing against real estate development interests and other natural economic development activities that just happen, and it is very expensive to preserve habitat areas. So we are talking about a lot of money to be able to do that; is that correct?

Mr. ATTENBOROUGH. I wonder whether that is really so. My suspicion is that the reason that a great deal or a number of species have disappeared and that vast areas of natural environment have been despoiled, is not because huge financial interests desperately needed a particular square mile of land, but because of carelessness or ignorance; because nobody bothered or thought it important; because nobody realized that if they stopped this flow of water or cut down that tree, it would have that effect.

What impresses me about this act as it stands, is that it requires people who are going to receive Government funds for these kinds of actions to consult with the appropriate service to see what the dangers to the environment might be, so that where possible, they may tailor their actions to produce the best ecological solution. I suspect that an awful lot could be done that way, and would be better done that way, than to try to put a lot of creatures in artificially created reserves.

Mr. LOWRY. I know that the chairman is going to want to move on, but let me ask, is it not fairly obvious that that is being done? The habitat is disappearing like mad, and, quite frankly, real estate development interests are just wiping out habitat all over the world. Maybe you and I have a difference of opinion of how big that economic reward and that economic incentive is.

Mr. ATTENBOROUGH. Well, I was referring to the United States when I spoke earlier in my answer. But if I were to ask about the destruction of habitat and its practical value, if I were to ask that question of a starving mother and her child in Ethiopia, I suspect that that person, would know well enough that the reason they are

starving, that their cattle have no vegetation to feed on, is that they had to cut down that small bush last night to cook their food. And if you were able to demonstrate to them that it was remotely possible to preserve a thin mantle of vegetation over their poor soil so that their animals would be able to graze, they would understand that. We all talk, here and in my country, as though eco-disaster is going to come in about 10 or 20 years time. Eco-disaster is with us right now and the people who suffer first are the people in the poorer parts of the world. They are only a portent of what is to come, unless we care and act.

Mr. LOWRY. Mr. Attenborough, what would be your opinion of a fund dedicated to the purpose of habitat preservation worldwide, the source of revenue for that fund being perhaps on imported species within this country?

Mr. ATTENBOROUGH. I think anything that we can do to give real strength to both national and international agreement on conservation would be invaluable. All these organizations need to have some certainty of financial support in the future, and some faith that it will go up and not down.

The World Wildlife Fund depends upon voluntary contributions, and we have to work very hard to make sure those do not diminish but increase. But if the funding of government agencies goes up and down, so they do not know whether they are going to be strong next year or weak, proper conservation becomes very, very difficult. Anything that insures that there will be a steady income to those agencies responsible is of great value. If the way to do that is some kind of levy, then that seems to me splendid.

Mr. LOWRY. Thank you very much, Mr. Attenborough.

Mr. BREAU. The Chair recognizes Congressman Bosco.

Mr. BOSCO. Thank you, Mr. Chairman.

Mr. Attenborough, I want to join my colleagues in thanking you for the quality of your work and for your testimony.

It may be that the answer to my question is one you would want to, if you would, submit at a later time because it might be too detailed. But this question of the destruction of the tropical rain forests is something that I think is lurking in all of our consciousnesses. The enormity, it seems, of the task of doing something about it, I think, may prevent us from wanting to think of it as being on the front burner, so to speak.

Is there something the U.S. Congress or that we as individuals should be doing now to prevent this disaster from occurring?

Mr. ATTENBOROUGH. I think it would be to give support internationally to the various bodies who have influence in those areas. There are international organizations, of course, like the World Bank to which countries in South America look in order to finance many of their projects such as building dams which will require the clearing of great areas of the rain forest. If it were made clear, through whatever media, that the U.S. Government felt so strongly about this problem that they insisted that before such appropriations were made from the World Bank or any other international organization, that an examination should be made of the ecological consequences of so doing, that would be a great step forward.

But I think that a great many of these problems can be dealt with through education. We can now demonstrate beyond any

doubt at all that the felling of the rain forest for the local farmers does not provide them with land which is going to be fertile and allow them to grow crops for generations to come. It is in fact a misguided act which leads to disaster and which will afflict them as well as the rest of the world.

Mr. BOSCO. Thank you very much.

Mr. BREAUX. Mr. Attenborough, thank you very much for being with us. You have journeyed all the way from London to meet with us specifically for this, and the committee very deeply appreciates your efforts in being with us. Thank you very much.

Mr. ATTENBOROUGH. Thank you, Mr. Chairman. It has been a privilege.

Mr. BREAUX. I would like to welcome up our next panel, which will be the administration. We have with us Mr. Bob Jantzen, who is the Director of the U.S. Fish and Wildlife Service of the Department of the Interior, and Mr. William Gordon, Director of the National Marine Fisheries Service. They have staff people with them and we would like to ask them to come to the witness table and we will receive their testimony.

STATEMENTS OF ROBERT JANTZEN, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR; AND WILLIAM GORDON, DIRECTOR, NATIONAL MARINE FISHERIES SERVICE; ACCOMPANIED BY ROBERT GILMORE, ASSOCIATE DIRECTOR, FEDERAL ASSISTANCE, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR; DONALD J. BARRY, ASSISTANT SOLICITOR, FISH AND WILDLIFE, DEPARTMENT OF THE INTERIOR; AND CLARK BAVIN, CHIEF OF LAW ENFORCEMENT, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY RICHARD B. ROE, DIRECTOR, OFFICE OF PROTECTED SPECIES AND HABITAT CONSERVATION

Mr. BREAUX. Mr. Jantzen, we have you listed first, so that you can go ahead with your testimony, summarize it if you wish or whatever.

Mr. JANTZEN. Thank you, Mr. Chairman. I appreciate the opportunity to be here today.

Since 1973, the Congress has enacted a number of amendments designed to make the Endangered Species Act more effective and at the same time to increase its flexibility for responding to potential problems. These changes, along with internal administrative improvements in the Federal departments responsible for implementing the act, have resulted in a program that is running more efficiently and cooperatively.

Mr. BREAUX. Bob, I think that mike might not be working. Maybe it is not turned on or something.

Mr. JANTZEN. All right.

Mr. BREAUX. Give it a turkey call.

Mr. JANTZEN. I thought you were going to say mallard. How is that?

Mr. BREAUX. OK.

Mr. JANTZEN. The Department of the Interior is requesting a 4-year reauthorization of the Endangered Species Act, without sub-

stantive amendments. In general, we recommend that H.R. 1027 be amended to authorize, during fiscal year 1986, \$23 million to the Department of the Interior for administration of the act under section 15(a)(1) and \$4 million for grants to States under section 15(b). These amounts, approximately equal to the appropriations by Congress for fiscal year 1985, are consistent with the President's fiscal year 1986 budget request and would provide for the continuation of our endangered species activities at current levels. We also recommend that such sums as may be necessary be authorized in the subsequent 3 fiscal years.

The process by which animals and plants are listed for protection, as outlined in section 4 of the act, was expedited by the Congress in 1982 and revised regulations implementing those changes are now in place. As a result, the listing rate has steadily increased. During 1984, for example, a total of 46 more native and foreign animals and plants were placed on the U.S. List of Endangered and Threatened Species. Another eight have been added since the beginning of 1985, and we expect a high total for this year due to the large number of listing proposals which are now under consideration. As of today, 831 animals and plants in the United States are listed as endangered or threatened.

Our increased emphasis on recovery is reflected in the more than 50 recovery plans that were approved during 1984, about one-third of the plans that have been approved since passage of the act.

As the numbers of listed species and Federal actions that may affect them increase each year, so do the numbers of section 7 consultations. It is usually possible to resolve potential problems to obviate the need for a formal consultation, particularly when the Federal agency involved initiates informal consultations at an early stage in the planning process. This is illustrated by the fact that the number of informal consultations has increased on the average of about 40 percent annually since 1979, while the total number of formal consultations decreased 70 percent over the same period.

When formal consultation does take place, it is our goal to both protect the listed species and their habitats and to find a way for the project to proceed. Numerous management approaches are used by the Service to achieve this goal. One of particular interest is being used to protect listed fishes found in the upper basin of the Colorado River system. This approach involves the active participation of Federal and State agencies and project applicants. Through compensation by the applicant for projects that are likely to jeopardize the listed fishes, a joint program can be launched to conserve and manage the water and fish resources. This approach is now being taken in a number of consultations on western water projects.

To address further long-term means by which potential conflicts may be resolved in the Colorado system, the Service has established the Colorado River Coordinating Committee. This group consists of representatives of the States of Wyoming, Colorado, and Utah, the Bureau of Reclamation, the Fish and Wildlife Service, and water development and conservation groups. The committee is seeking various approaches that will enable project development to comply with the Endangered Species Act, while both maintaining

interstate compact agreements and other water rights under State law.

The success of conservation and restoration efforts for listed species depends in large part on maintaining a good working relationship with our counterparts in the States. Under the authority granted in section 6 of the act, the Fish and Wildlife Service has reached final cooperative agreements with 44 States and U.S. territories, including 42 agreements for fish and wildlife and 18 for plants. All States with approved cooperative agreements may apply for section 6 matching grant-in-aid funds.

In fiscal year 1985, 146 separate conservation and restoration projects in 37 States were funded out of the \$4 million appropriated by the Congress.

Mr. Chairman, there are a couple of other issues that we believe should be brought to your attention as matters of potential concern. One involves the enforcement of laws to protect bald eagles. On January 9, 1985, the Eighth Circuit Court of Appeals ruled in *United States v. Dion*, holding that the non-commercial taking of endangered or threatened wildlife by an Indian on the Yankton Sioux Reservation is a legitimate exercise of treaty rights, exempt from prosecution under various Federal statutes protecting wildlife. In terms of the protection and conservation of endangered and threatened species like the bald eagle, the decision could have serious implications. The unregulated taking of listed species could disrupt our ability to develop and implement recovery plans for such species, as well as significantly impact the biology of the species. The Department of the Interior has requested that the Department of Justice seek review of this ruling by the U.S. Supreme Court.

Another subject of concern is the Minnesota wolf situation. Regulations published in 1983 for transferring primary management authority to the State of Minnesota contained a provision allowing for limited sport trapping, as recommended by the recovery team. However, the U.S. District Court for the District of Minnesota issued a ruling that prevents implementation of a wolf trapping season, a decision that was recently upheld by the Eighth Circuit Court of Appeals. We believe that this case forecloses a management option of potential value, but that further study is needed before a possible legislative remedy can be recommended.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions that you may have.

[The prepared statement of Mr. Jantzen follows:]

PREPARED STATEMENT OF ROBERT A. JANTZEN, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman, I appreciate the opportunity to appear here today to discuss the reauthorization of the Endangered Species Act of 1973, as amended.

As you know, the Act is probably the most far-reaching law ever enacted by any country to prevent the extinction of imperiled animals and plants. Conserving these biological resources is a complex job involving not only the Federal Government, but the States, the scientific community, conservation organizations, industry, and concerned individuals as well. Since 1973, the Congress has enacted a number of amendments designed to make the Act more effective and, at the same time, to increase its flexibility for responding to potential problems. These changes, along with internal administrative improvements in the Federal departments responsible for implementing the Act, have resulted in a program that is running efficiently and cooperatively.

The Department of the Interior is requesting a 4-year reauthorization of the Endangered Species Act, without substantive amendments. We recommend that H.R. 1027 be amended to authorize, during fiscal year 1986, \$23 million to the Department of the Interior for administration of the Act under section 15(a)(1) and \$4 million for grants to States under section 15(b). These amounts, approximately equal to the appropriations by Congress for FY 1985, are consistent with the President's FY 1986 budget request and would provide for the continuation of our endangered species activities at current levels. We also recommend that such sums as may be necessary be authorized in the subsequent three fiscal year. Specific funding requests for FY 1987-1989 will be prepared during the normal budget formulation process.

A review of our efforts over the past several years may have a bearing on the Committee's consideration of the reauthorization of the Endangered Species Act.

LISTING ACCOMPLISHMENTS

The process by which animals and plants are listed for protection, as outlined in section 4 of the Act, was expedited by the Congress in 1982, and revised regulations implementing those changes are now in place. As a result, the listing rate has steadily increased. During 1984, for example, a total of 46 more native and foreign animals and plants were placed on the U.S. List of Endangered and Threatened Species. Another eight have been added since the beginning of 1985, and we expect a high total for this year due to the large number of listing proposals now under consideration. As of today, 831 animals and plants in the U.S. and foreign countries are listed as endangered or threatened.

Future listing actions will be facilitated by our ongoing candidate assessment program. Since 1982, the Fish and Wildlife Service has published periodic notices on vertebrate wildlife, invertebrate wildlife, and plants for which there is reason for concern. As new data become available, the notices are reevaluated and updated. Species on these notices, along with those species for which the Fish and Wildlife Service has accepted listing petitions, are considered candidates for future listing protection under the Endangered Species Act. Although the Act does not authorize legal protection for candidate species, Federal agencies have found the notices helpful for planning to avoid potential problems. BLM, for example, uses the candidate species list to identify species needing special management and gives those species special consideration in making resource management decisions.

RECOVERY ACCOMPLISHMENTS

Restoring endangered and threatened species to the point that they are again secure members of their ecosystems, and thereby no longer in need of special Federal protection, is a most critical element of the endangered species program. Listing a species is of limited value if steps are not taken toward recovery. Our increased emphasis on recovery is reflected in the more than 50 recovery plans that were approved during 1984, about one-third of the plans that have been approved since passage of the Act.

The past year has provided encouraging news about a number of species. Just recently, for example, the Fish and Wildlife Service was able to remove the brown pelican in most of the southeastern United States from the list of endangered and threatened species. This population has reached or exceeded historical numbers, recovering from the devastating effects of the pesticide DDT, which almost extirpated the pelican over much of its range in the 1960s. Other birds that were imperiled by DDT, particularly the bald eagle and peregrine falcon, are responding to the ban on this chemical more slowly than the brown pelican, but intensive recovery activities for these species are showing promising results.

Among the species that were secure enough to be reclassified from endangered to threatened during the past year are the Arctic peregrine falcon and the Utah prairie dog. Although they are still in need of some protection, the category of threatened allows for greater management flexibility. An animal that we believe may be ready for a change in status under the Act is the Florida population of the American alligator, and we have proposed to put it into a category similar to that covering the alligator populations in Louisiana and Texas.

The complex, usually difficult task of recovering endangered species is one that is too large for any single agency. A coordinated recovery program involving Federal, State, and local interests is usually necessary. Such an approach was initiated in 1983 when the Interagency Grizzly Bear Committee (IGGC) was established. The IGBC is composed of top-level managers from the Fish and Wildlife Service, the National Park Service, the Forest Service, the Bureau of Land Management, and the States of Wyoming, Montana, Idaho, and Washington. It coordinates research, man-

agement, law enforcement, and funding for conservation of the threatened grizzly bear in the conterminous 48 States. Recovering this large carnivore in the face of continuing threats cannot be accomplished quickly or easily, but we are hopeful that the IGBC program will at least make the recovery goal possible. In the meantime, close interagency cooperation is being emphasized in a variety of other recovery programs.

The "experimental population" approach, authorized by the 1982 amendments as a tool for recovery of listed species, is beginning to show results. General regulations implementing the concept were published on August 27, 1984. Special regulations to establish the first experimental population of an endangered species were approved September 13, 1984. Within days, seven Delmarva fox squirrels were captured near Blackwater National Wildlife Refuge in Maryland and released into the Assawoman Wildlife Area, land managed by the State of Delaware. The Fish and Wildlife Service, working in close cooperation with Delaware and Maryland wildlife officials, plans several more such releases to augment the small experimental population. We have high hopes that this joint venture will hasten the day when the Delmarva fox squirrel is recovered and can safely be delisted. Plans for establishing experimental populations of other species are now under consideration by the appropriate State and Federal agencies.

INTERAGENCY COOPERATION

Section 7 of the Act, which contains the interagency cooperation and exemption processes for actions having Federal agency involvement, was substantially amended in 1982. A set of comprehensive regulations that implement these changes, along with modifications required by the 1978 and 1979 amendments to the Act, were proposed June 29, 1983. There has been widespread interest in the proposed regulatory changes and a large number of comments were received. The final rule is under review by the Departments of Commerce and the Interior, and we expect to have it out within several months. We believe the final regulations will be effective in minimizing the potential for conflict arising from proposed Federal agency actions.

As the numbers of listed species and Federal actions that may affect them increase each year, so do the numbers of section 7 consultations. The consultation process involves an exchange of information among the Service, the Federal agency, and any permit or license applicant. It is usually possible to resolve potential problems to obviate the need for a formal consultation, particularly when the Federal agency involved initiates informal consultations at an early stage in the planning process. This is illustrated by the fact that the number of informal consultations has increased on the average of about 40 percent annually since 1979, while the total number of formal consultations decreased 70 percent over the same period.

When formal consultation does take place, it is our goal to both protect the listed species and their habitats and to find a way for the project to proceed. Numerous management approaches are used by the Service to achieve this goal. One of particular interest is being used to protect listed fishes found in the upper basin of the Colorado River system. This approach involves the active participation of Federal and State agencies that are likely to jeopardize the listed fishes, a joint program can be launched to conserve and manage the water and fish resources. This approach is now being taken in a number of consultations on western water projects.

To address further long-term means by which potential conflicts may be resolved in the Colorado system, the Service has established the Colorado River Coordinating Committee. This group consists of representatives of the States of Wyoming, Colorado, and Utah, the Bureau of Reclamation, the FWS, and water development and conservation groups. The Committee is seeking various approaches that will enable project development to comply with the Endangered Species Act while both maintaining interstate compact agreements and other water rights under State law.

During FY 1984 the Fish and Wildlife Service participated in 8,165 consultations, all but 300 of them informal. Of the 300 formal consultations, 277 resulted in "no jeopardy" biological opinions, and "reasonable and prudent alternatives" for avoiding jeopardy were provided for the great majority of others. The numbers of consultations needing time extensions has also decreased each year, and in FY 1984 the total was down to 27.

Another change mandated by the 1982 amendments to the Endangered Species Act was a significant streamlining of the section 7 exemption process, by which a cabinet-level committee may grant an exemption from a Secretarial determination under section 7 that an agency action will violate section 7(a)(2) of the Act. Regulations implementing these procedural changes were published on February 28 of this year. Section 15(c) of the Act authorized \$600,000 annually in FY 1983-1985 for the

Endangered Species Committee to review requests for exemptions. However, funds for this purpose have been neither requested nor appropriated, since the Department of the Interior has received no exemption requests during this time. We view this lack of exemption requests as evidence that the interagency cooperation process is working well. Although no exemption funds are requested for FY 1986, we believe it is important to reauthorize this activity to ensure that the exemption process remains available, if needed. Accordingly, we request that such sums as may be necessary be authorized for this purpose under section 15(c). Specific funding may be requested in the future, depending on whether or not any exemption requests are anticipated.

For those actions or projects that do not involve Federal agencies, protection for listed species and their habitats can sometimes be gained through a habitat conservation plan and the granting of a section 10 permit. The 1982 amendments added a provision to section 10 allowing the issuance of a permit for taking of an endangered species if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Prior to the 1982 amendments, a permit to take an endangered species could be issued only for takings for scientific purposes or to enhance the propagation or survival of the species.

In order to obtain such a permit, the applicant must submit a habitat conservation plan that promotes the long-term conservation of the species in the wild. The plan must include steps that will be taken to minimize and mitigate the impacts the action will likely have on listed species and their habitats, along with assurances that adequate funding for the plan will be provided. Such a plan has been written to conserve the unique flora and fauna of San Bruno Mountain in California, and others are being developed, such as for the Coachella Valley in southern California's Mojave Desert. The San Bruno plan was upheld in litigation in the Northern District of California and the case was argued in the Ninth Circuit on February 15, 1985. The outcome of this case of first impression will be very important to the section 10 program.

COOPERATION WITH THE STATES

The success of conservation and restoration efforts for listed species depends, in large part, on maintaining a good working relationship with our counterparts in the States. Under the authority granted in Section 6 of the Act, the Fish and Wildlife Service has reached final Cooperative Agreements with 44 States and U.S. territories, including 42 agreements for fish and wildlife and 18 for plants. Additional agreements are in various stages of development. All States with approved Cooperative Agreements may apply for section 6 matching grant-in-aid funds, which are allocated by the Service according to specific criteria, such as the relative urgency of the problems facing a species. A few of the species that we hope will benefit from projects being carried out this fiscal year are the bald eagle, Kirtland's warbler, several species of sea turtles, and the mountain golden heather. Another example I have already mentioned, that of the Delmarva fox squirrel, is a section 6 cooperative effort, and it illustrates that such projects can involve agencies from more than one State at a time.

In FY 1985, 146 separate conservation and restoration projects in 37 States were funded out of the \$4 million appropriated by the Congress. We are requesting that Congress authorize the same amount, \$4 million, for FY 1986, and funds as may be necessary in FY 1987-1989, to allow for the stability of State programs for endangered and threatened species, particularly multi-year projects. Since species recovery plans, once developed, are generally the foundation upon which the States build their own programs, such funding will be in keeping with our increased emphasis on recovering rare wildlife and plants.

LAW ENFORCEMENT

There is no question that a vigorous law enforcement effort is necessary for the success of the endangered species program. Our efforts in recent years are highlighted by cases such as Operation Falcon, which resulted in approximately 40 convictions for trade in endangered peregrine falcons and other protected birds, and Operation Trophy Kill, an investigation that detected poaching and illegal trophy importations of ocelot, jaguar, and other endangered spotted cats.

Another area of special emphasis, protection of the threatened grizzly bear, is giving us significant encouragement. Due to stepped-up law enforcement investigations and patrols, poaching of grizzlies has been declining in recent years. One of the defendants, for example, was convicted on March 7, 1985, of seven counts of wildlife violations, including four felonies. In fact, during 1984, there were no known

illegal kills in the Yellowstone ecosystem. We plan to do everything we can to maintain this record of success. In addition, we have undertaken extensive public education efforts to reduce bear interaction with humans.

There are a couple of issues, however, that we feel should be brought to your attention as matters of potential concern. One involves the enforcement of laws to protect bald eagles. On January 9, 1984, the Eighth Circuit Court of Appeals ruled in *United States v. Dion*, No. 83-2353, holding that the non-commercial taking of endangered or threatened wildlife by an Indian on the Yankton Sioux Reservation is a legitimate exercise of treaty rights, exempt from prosecution under various Federal statutes protecting wildlife. In terms of the protection and conservation of endangered and threatened species like the bald eagle, the decision could have serious implications. The unregulated taking of listed species could disrupt our ability to develop and implement recovery plans for such species, as well as significantly impacting the biology of the species.

The Department of the Interior has requested that the Department of Justice seek review of this ruling by the U.S. Supreme Court. We are hopeful that the *Dion* ruling will be overturned by the Supreme Court. Accordingly, we are not recommending any statutory amendments at this time. However, should the case not go to the Supreme Court, or should the Court rule adversely, we would consider appropriate statutory remedies.

Another subject of concern is the Minnesota wolf situation. Regulations published in 1983 for transferring primary management authority to the State of Minnesota contained a provision allowing for limited sport trapping, as recommended by the recovery team. The Fish and Wildlife Service's experts believe that a regulated take of wolves could relieve pressure on livestock owners and help to create a more favorable public attitude toward the recovery of this animal. However, on January 5, 1984, the U.S. District Court for the District of Minnesota issued a ruling that prevents implementation of a wolf trapping season, a decision that was recently upheld by the Eighth Circuit Court of Appeals. We believe that this case forecloses a management option of potential value, but that further study is needed before a possible legislative remedy can be recommended.

INTERNATIONAL CONSERVATION EFFORTS

Since wildlife does not respect national boundaries, the maintenance of biological diversity is a matter of international concern. The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, usually referred to as the Western Hemisphere Convention, seeks to conserve our region's native flora and fauna, including migratory birds, in the face of widespread habitat loss and environmental degradation. Nearly all of the countries in our hemisphere now are signatories to the Convention.

We have initiated a number of important projects to further the purpose of the Western Hemisphere Convention, with an emphasis on the training of local managers. For example, over 100 Latin American biologists from 20 countries have been able to attend U.S.-sponsored workshops on management of refugees, migratory birds, crocodilians, management planning, environmental education, and research techniques. The heads of most Latin American wildlife agencies have participated in these workshops.

However, because we have sufficient existing statutory authority to undertake this important work, and because our FY 1986 budget submission does not contain a specific request for Western Hemisphere Convention activities, we do not believe that reauthorization of section 15(d) of the Endangered Species Act is necessary.

In addition to our activities in the Western Hemisphere, the Fish and Wildlife Service has taken advantage of the foreign currency authority in section 8 to implement a number of wildlife and habitat management, research, and training activities of benefit to threatened and endangered species in India, Egypt, and Pakistan. As these countries elevate their priorities for the maintenance of their living resources, we have been able to provide extensive assistance and support without an expenditure of U.S. dollars. Most recently, we assisted with initial planning for establishment of the first protected area ever in Egypt. Feedback and support from Ambassador Veliotis on this project have been outstanding. Although we have employed in excess of \$4 million in foreign currencies over the history of this activity, it has not been burden upon the Service because we work through private groups, foundations, universities, and research institutions to carry out our objectives.

Another agreement to which the U.S. is a Party is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The agreement is implemented in this country through the Endangered Species Act. CITES, which

now has 89 Parties, has become a leading instrument in the conservation of species threatened by trade. U.S. agencies involved with CITES include the Departments of State, Agriculture, Commerce, Interior (the actual U.S. Management and Scientific Authority), and Justice. CITES matters are discussed at regular biennial conferences (next conference scheduled for April 22-May 3, 1985, in Buenos Aires, Argentina) and additional technical and administrative meetings.

Since 1982, the Parties have taken steps to improve implementation of CITES through: emphasis on complying with the permit requirements for international trade in plants; training seminars for plant/wildlife port inspectors and CITES administrators; production of an Identification Manual; compilation of a summary of Latin American wildlife trade laws; computerization and analyses of trade data; development of proposals for the ranching of green sea turtles and Nile crocodiles; and a quota system for trade in leopard trophies. Domestically, the Service administers a plant rescue center program that assigns to botanical or zoological institutions confiscated specimens that otherwise would be destroyed. We have increased efforts to curtail illicit trade in protected species. The Service also oversees a tag program for CITES-regulated wildlife species (including bobcat, lynx, river otter, and American alligator) managed by the States, but exported from this country. A conclusion that may be drawn from these and other activities is that CITES has come of age, and that the Parties are taking meaningful steps to regulate international trade in a rational manner.

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions you or any of the other Committee members might have. I would also like to add at this time that we appreciate your continuing support for the endangered species program, and we stand ready to assist in any way we can during the entire reauthorization process.

Mr. BREAUX. We have some questions, Bob, but we will wait until Mr. Gordon gives his presentation.

STATEMENT OF WILLIAM GORDON

Mr. GORDON. Thank you, Mr. Chairman and members of the subcommittee.

I have with me this morning Mr. Richard Roe, who is the Director of the Office of Protected Species and Habitat Conservation.

We appreciate the opportunity to offer the views of the Department of Commerce on the reauthorization of the Endangered Species Act of 1973. This act is vital to the conservation of species of fish, wildlife, and plants that are threatened or endangered with extinction.

The National Marine Fisheries Service, within the Department of Commerce, is charged with conserving and protecting various marine species of fish, turtles, seals, sea lions, porpoises, and whales that are threatened or endangered with extinction. Our efforts are focused on three major program areas—listing, consultation, and recovery. In the interest of time, I am going to summarize my testimony and provide a more extensive one for the record.

We view the listing process under section 4 as one of the most critical elements, because it sets in motion protective measures, including consultation and recovery.

In 1984, the Fish and Wildlife Service and the National Marine Fisheries Service published joint final regulations implementing the 1982 amendments to section 4, establishing the criteria and procedures for determining whether species are endangered or threatened, designating critical habitat, for receiving and considering petitions, and conducting status reviews of species listed as endangered or threatened.

We recently have completed a 5-year status review of most species listed under our jurisdiction. Based on these reviews, we have

concluded that the gray whale should be listed as threatened, rather than endangered; the western North Atlantic population of olive ridley sea turtles should be listed as endangered, rather than threatened; and the Caribbean monk seal should be removed from the list because it is extinct. All other species are appropriately listed. Actions implementing changes will be taken during the next year.

Section 7 of the act requires all Federal agencies, in consultation with the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species. I believe that the consultation process has worked well for Federal actions affecting listed marine species.

Although Federal agency authority and responsibility under section 7 have remained intact from the 1973 act, amendments to the act have made significant procedural changes in the section 7 consultation processes. The Fish and Wildlife Service and NMFS published proposed regulations that would implement these amendments in 1983. Final regulations are being cleared at this time by both agencies. Although this has been a time-consuming process, we believe that our response to the numerous issues and concerns raised by respondents, including yourself, Mr. Chairman, have resulted in regulations that streamline the consultation process and clarify agency responsibilities under section 7.

We believe the act's goal is to recover listed fauna and flora to a point where protective measures are no longer necessary for their general health and welfare. To that purpose, we have developed and implemented recovery plans for the critically endangered Hawaiian monk seal and the six species of sea turtles found in the Atlantic. A Pacific sea turtle recovery team is being established and will prepare a recovery plan for that region.

The Hawaiian monk seal recovery plan includes (1) research to assess the status and trends of the population; (2) a headstart program for monk seal pups; and (3) a program to reduce the adverse impacts of male seals on females and immature seals where sex ratios have become imbalanced.

Our efforts to recover sea turtles include research, as well as the development and promotion of a trawling efficiency device [TED] that excludes about 97 percent of all sea turtles that are taken in the shrimp fishery, while increasing the shrimp catch as much as 7 percent in some areas.

In addition, we have participated with the Government of Mexico, the Fish and Wildlife Service, the National Park Service and State agencies in a headstart program for the Kemp's ridley sea turtle.

Our whale recovery efforts are focused primarily through participation in the International Whaling Commission. Other of our international efforts include assisting the Department of the Interior in administering the Convention on International Trade in Endangered Species of Wild Fauna and Flora [ITES] and participating in the Western Atlantic Turtle Symposium [IOCARIBE], as well as in the Wider Caribbean Sea Turtle Conservation Network, which is a group of non-government entities working in that area.

The 1982 amendments to the Act allowed for a three-year extension of the Certificates of Exemption which allow the sale, export and interstate commerce of certain pre-act endangered species ports. We have written regulations to put this extension into effect, and they should be published later this month. The new regulations would impose additional restrictions on the conditions under which certificate holders may dispose of their inventories and will require certificate holders to keep more detailed records and provide us with quarterly reports of their activities.

The 1982 amendments also added a provision to the act authorizing the Secretary to issue permits to take endangered species incidental to an otherwise lawful activity, provided such taking will not appreciably reduce the likelihood of the survival and recovery of the species, and that the applicant will implement conservation measures to mitigate any impacts of such takings. We are developing regulations to implement these amendments and anticipate publishing a proposed rule later this year. Permits issued under these regulations could be used to allow commercial and recreational fishermen and others to conduct their activities without risk of prosecution for incidentally taking certain endangered species. We believe that this process will contribute to the acquisition of valuable information on endangered species taken incidental to these activities.

At this time I would like to point out some problems we find troublesome in our implementation of the act that may warrant your attention.

As I mentioned, the 1982 amendments gave us the authority to issue, under limited circumstances, permits for the taking of endangered species incidental to an otherwise lawful activity. However, permits can only authorize takings within the United States or its territorial sea.

We are considering issuing a permit for the take of endangered sea turtles incidental to the Gulf of Mexico shrimp fishery. Issuance of such a permit could yield valuable data on the Kemp's ridley sea turtle without increasing the number of takings, all of which now go unreported. Under the act as it now stands, that permit would have only limited benefit, since most of the shrimping occurs outside of the 3-mile territorial sea. Therefore, the Department of Commerce may propose an amendment that would allow permits to be issued for the incidental taking of endangered species on the high seas.

We are also experiencing some problems due to inconsistencies between the Marine Mammal Protection Act and the Endangered Species Act. Most of the endangered and threatened species under the jurisdiction of the Department of Commerce are marine mammals that also are protected under the Marine Mammal Protection Act of 1972. Under the provisions of the Marine Mammal Protection Act, permits for endangered or threatened marine mammals can be issued only for scientific research. The Endangered Species Act contains other exceptions, including the authority to issue permits for the enhancement of the propagation or survival of the species and for takings incidental to an otherwise lawful activity if such takings are not likely to jeopardize the continued existence of the species, and if specified mitigation measures are followed. How-

ever, since section 17 of the Endangered Species Act provides that any more restrictive and conflicting provisions of the Marine Mammal Protection Act take precedence, these exceptions of the Endangered Species Act do not apply to endangered and threatened marine mammals.

Currently, we are able to characterize certain recovery activities, such as the headstart program to reduce mortality among Hawaiian monk seal pups, as scientific research since the results of the program are unknown. However, if the program is successful and merits application as a management measure to enhance the survival of the species, no permits could be issued because of the Marine Mammal Protection Act provisions that prohibit taking endangered or threatened marine mammals for purposes other than research. Similarly, certain takings incidental to Federal activities that could be allowed under the Endangered Species Act are now prohibited. For example, some seismic work conducted by the oil industry off the coast of Alaska could violate the Marine Mammal Protection Act if the noise generated results in harassment of whales. Such a taking cannot be authorized under the Marine Mammal Protection Act, although it could under the Endangered Species Act.

To alleviate these inconsistencies, the Department of Commerce may propose an amendment to section 17 of the Endangered Species Act that would enable certain takings of endangered or threatened marine mammals to be authorized under the Endangered Species Act without violating the Marine Mammal Protection Act.

The Department of Commerce also believes that the antique articles exemption of section 10(h) of the Endangered Species Act needs clarification. The 1982 amendments changed the exemption to apply to articles more than 100 years old, rather than to articles made after 1830. This had been interpreted by some as meaning that only the endangered species parts, rather than the fashioned articles, must be over 100 years old.

We may propose an amendment that clarifies that the antique item must have been fashioned more than 100 years ago. This would be desirable both for identification purposes and to promote the goal of discouraging markets in more recently crafted endangered species parts.

A district court upheld the agency's interpretation that the antique item must have been fashioned more than 100 years ago to fit under the exemption. Since this question may be the subject of further lawsuits, I believe that congressional clarification of this provision may be needed.

Mr. Chairman, I believe that the act has been working well with respect to marine species and can work even better in the future and I urge that authorization of this act be extended for a period of 4 years.

We thank the subcommittee for the opportunity to appear here today and I will be more than pleased to work with the committee on our proposals or to answer any questions you may have.

[The prepared statement of Mr. Gordon follows:]

PREPARED STATEMENT OF WILLIAM G. GORDON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to offer the views of the Department of Commerce on the reauthorization of the Endangered Species Act of 1973. This Act is vital to the conservation of species of fish, wildlife, and plants that are threatened or endangered with extinction.

The authorizations for appropriations under Section 15 of the Act are scheduled to expire in 1985, and must be extended for important conservation programs to continue. The Department of Commerce recommends authorization of appropriations to this agency at \$2,775,000 for fiscal year 1986 and at such sums as may be necessary for fiscal years 1987, 1988, and 1989.

Over the past years, a number of amendments to the Act have been made to allow greater flexibility in resolving conflicts while preserving the original purposes of the Act to conserve species. Although the Act continues to be the subject of much controversy and discussion, it has, for the most part, worked well.

The National Marine Fisheries Service (NMFS) of the National Oceanic Atmospheric Administration (NOAA) is charged with conserving and protecting various marine species of fish, turtles, seals, porpoises, and whales that are threatened or endangered with extinction. Our efforts are focused on three major program areas—listing, consultation and recovery. Today I will discuss some of the progress made in these areas including implementation of the 1982 Amendments to the Endangered Species Act.

LISTING

The listing process is the critical step in implementing the protections of the Endangered Species Act because it sets in motion the Act's other provisions including consultation and recovery. Section 4 of the Act, which governs listing, delisting and critical habitat determinations, was amended in 1982 to ensure that listing decisions are based solely on biological criteria, to streamline the process and to impose certain time constraints.

Regulations.—In 1984, the Fish and Wildlife Service and NMFS published joint final regulations incorporating these amendments into the listing process. These regulations establish the criteria and procedures for determining whether species are endangered or threatened, designating critical habitat, for receiving and considering petitions, and conducting status reviews of species listed as endangered or threatened.

5-Year Status Reviews.—We recently completed the 5-year status reviews of most species listed under NMFS's jurisdiction to determine whether a change in the listing status of any species is warranted. Based on these reviews, NMFS concluded that: the gray whale should be listed as threatened rather than endangered since it has recovered to near its original population size; the nesting population of olive ridley sea turtles in the western North Atlantic (Surinam and adjacent areas) should be listed as endangered rather than threatened; and, the Caribbean monk seal should be removed from the list since the best available information indicates that it is extinct. The NMFS expects to initiate these actions during the next year. The remaining species under NMFS's jurisdiction are appropriately listed.

Petitions.—The Act allows interested persons to petition to add or remove species from the list of endangered and threatened species. If the petition presents substantial information indicating that the proposed action may be warranted, the agency reviews the status of the species to determine whether a change in listing should be made. Over the past three years, NMFS has responded to eight petitions, four of which resulted in status reviews. Based on these reviews, NMFS listed the cochito, a Gulf of California harbor porpoise, as an endangered species, proposed to list the Guadalupe fur seal as a threatened species, and determined that listing the North Pacific Fur Seal and striped bass under the provisions of the Act was not warranted.

CONSULTATION

Section 7 of the Act requires all Federal agencies, in consultation with the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species.

Regulations.—Federal agency authority and responsibility under Section 7 have remained intact from the 1973 Act; however, amendments to the Act have modified the consultation requirements of Section 7. Many of these changes are designed to

improve interagency cooperation by streamlining the consultation process. We have worked with the Fish and Wildlife Service in developing joint regulations implementing the changes required by these amendments. Proposed regulations have been published and have received extensive review by Federal and State agencies, the environmental community, industry and other interested parties. The proposal has been revised to address several issues and concerns including those raised by Representatives John Breaux and the late Edwin Forsythe in their letter commenting on the regulations. We anticipate publishing final Section 7 regulations in the near future. We believe that the final rule will further clarify Federal agency consultation requirements under Section 7.

Consultations.—The consultation process has worked well for Federal actions affecting listed marine species. Since 1982, we have received 1,073 requests for consultation. NMFS has encouraged agencies engaged in actions or programs that may affect listed species or their habitat to initiate consultation during the planning stages of their activities. This approach has allowed us to assist Federal agencies in planning their activities to avoid adverse impacts to listed species. As a result, the majority of the consultations were conducted informally and did not require preparation of biological opinions. There were 78 formal consultations conducted during this period, of which 61 resulted in "no jeopardy" determinations, 16 found "jeopardy", and 1 concluded that there was not enough information available to ensure no jeopardy to listed species involved. Reasonable and prudent alternatives were provided in all "jeopardy opinions" and were adopted in all but one instance.

Although the consultation process has resulted in modifications to a number of projects, NMFS has rendered only one jeopardy finding that contributed significantly to a Federal agency denial of a permit to conduct a proposed activity.

RECOVERY

The ultimate goal of all activities under the Act is to restore listed species, stocks, or populations to the point where protective measures are no longer necessary for the species to be a self-sustaining part of its ecosystem. In some cases, however, the immediate goal may be to prevent its extinction.

Hawaiian Monk Seal.—NMFS remains particularly concerned over the status of the endangered Hawaiian monk seal and has developed, and is implementing, a recovery plan for this species. Major efforts in recent years include: (1) research to assess the status and trends of the population including age-specific survival and mortality rates; (2) a head start program at Kure Atoll to maintain monk seal pups in captivity for a short time to increase the probability of their survival; and (3) the identification of male monk seals responsible for attacks on females and immature seals at Laysan Island and the development of a project intended to reduce mortalities by removing these males from the population.

NMFS has also proposed that certain waters and lands of the Northwest Hawaiian Islands be designated as critical habitat for the monk seal. Since much of the species' range includes the Hawaiian Islands National Wildlife Refuge, the Fish & Wildlife Services cooperates, through consultation and research programs, in conservation efforts for the Hawaiian monk seal.

SEA TURTLES

Recovery Team/Plan.—The recovery team has completed a Marine Turtle Recovery Plan that identifies actions that can be taken by various Federal and State agencies to promote the recovery and conservation of the six species of sea turtles found in the Atlantic. NMFS has provided administrative and financial support for this long-term effort. We have approved the Recovery Plan and have begun implementing recommended actions.

Headstart Program.—Since 1978, NMFS has participated in a program in cooperation with the Government of Mexico, U.S. Fish and Wildlife Service, National Park Service and State agencies in Texas and Florida to prevent the extinction of the Kemp's ridley sea turtle, the most endangered of the marine turtles. NMFS has been rearing young Kemp's ridleys in captivity during their critical first year of life, then tagging and releasing them into the Gulf of Mexico. The goal of this headstart program is to establish a new nesting colony on Padre Island, Texas, which is within the former nesting range of the species. Some Kemp's ridleys from the headstart program have been distributed to a number of marine aquaria and the Cayman Turtle Farm as a potential captive breeding stock. One 5-year-old ridley nested at Cayman Turtle Farm in 1984. This represents a major breakthrough in the recovery program because it sets the stage for captive breeding as a "safety net" for the species.

Trawling Efficiency Device.—NMFS has undertaken additional measures to protect sea turtles including the development of the trawling efficiency device (TED). We estimate that approximately 12,600 sea turtles die annually in shrimp trawls and an additional 33,000 are captured and released alive. The TED excludes about 97 percent of all sea turtles that are captured in trawls and increases shrimp catch up to 7 percent. The device also reduces unwanted bycatch, reduces trawl drag, and may result in fuel savings. NMFS is continuing its efforts to promote voluntary use of the TED. Because of the ancillary benefits to shrimp trawling operations, we believe that shrimp fishermen will adopt use of the device voluntarily thereby reducing the incidental take and mortality of sea turtles.

State Cooperation.—Recently, NMFS entered into a Cooperative Agreement with South Carolina under Section 6 of the Act to promote the conservation of endangered and threatened species. To enter into an agreement, a State must have an adequate and active program for the conservation of resident endangered and threatened species. The agreement establishes a framework for State-Federal cooperation in research, enforcement and recovery efforts.

International Activities.—Our international efforts regarding endangered species include encouraging research and conservation of endangered and threatened species; participating in the International Whaling Commission; and assisting the Department of the Interior in administering the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES). We have also participated in the Western Atlantic Turtle Symposium sponsored by the Intergovernmental Oceanographic Commission Association for the Caribbean and Adjacent Regions (IOCARIBE) and the Wider Caribbean Sea Turtle Conservation Network.

NMFS recently signed a Memorandum of Understanding (MOU) with the U.S. Fish and Wildlife Service and the Cayman Islands Government to promote the conservation of sea turtles in the Caribbean and the Western North Atlantic regions. The MOU falls within the scope of Section 8(b) of the Act which, among other things, provides the Secretary with the authority to enter into agreements with foreign countries for the purpose of conserving endangered and threatened species. We believe that this agreement will enhance conservation efforts for migratory sea turtle species.

Enforcement.—Enforcement of the Act is a critical component necessary to promote the recovery of endangered and threatened species. Enforcement activities include investigation and control of illegal taking and control over importing and exporting activities. There are 93 NMFS Special Agents located in 41 coastal field stations throughout the country whose duties, among other things, include enforcing the Act. Cooperation between NMFS Special Agents and State conservation officers in most coastal states is improving each year. The NMFS has cooperative enforcement agreements or memoranda of understanding with 13 coastal States to assist in carrying out the enforcement provisions of the Act.

Certificates of Exemption.—In 1976, the Act was amended to allow persons who held quantities of certain pre-Act endangered species parts to obtain certificates of exemption giving them a 3-year period to sell their stocks through exportation or interstate commerce. NMFS originally issued a total of 58 certificates of exemption under this program to persons holding stocks of sperm whale oil, spermaceti, whale teeth, whale bone and baleen. The certificates were extended for an additional 3 years under the 1979 amendments to the Act. Several certificate holders, including all those who held whale oil and spermaceti have depleted their stocks. Only 37 certificates remain in effect.

The 1982 amendments to the Act allowed for another 3-year extension of the certificates. NMFS has written regulations to put this extension into effect. The regulations are currently undergoing final review at the Office of Management and Budget. These regulations may be published this month. The proposed regulations would impose additional restrictions on the conditions under which certificate holders may dispose of their inventories. Also, in order to facilitate enforcement, these regulations would require certificate holders to keep more detailed records and to provide NMFS with quarterly reports of their activities.

Permits.—Issuing permits provides another means of fulfilling our conservation responsibilities under the Act. In particular, permits for scientific research and enhancement of the survival of endangered species are an integral part of recovery programs. Permits also provide an essential element of control over activities that could result in adverse impacts to endangered and threatened species.

The 1982 amendments added a provision to the Act authorizing the Secretary to issue permits to take endangered species incidental to an otherwise lawful activity, provided such taking will not appreciably reduce the likelihood of the survival and recovery of the species and that the applicant will implement conservation meas-

ures to mitigate the impacts of such takings. NMFS is developing regulations to implement these Amendments and anticipates publishing a proposed rule later this year. Permits issued under these regulations could be used to allow commercial and recreational fishermen and others to conduct their activities without risk of prosecution for incidentally taking certain endangered species. We believe that this process will contribute to the acquisition of valuable enforcement on endangered species taken incidental to these activities.

ISSUES

At this time, I would like to point out certain conflicts that have arisen in implementing the 1982 Amendments that may warrant clarification.

Incidental Take Permits on the High Seas.—The 1982 Amendments to the Act provided authority for NMFS to issue, under limited circumstances, permits for the taking of endangered species incidental to an otherwise lawful activity. However, permits can only authorize takings within the United States or its territorial sea.

NMFS is considering issuing a permit for the take of endangered sea turtles incidental to the Gulf of Mexico shrimp fishery. Issuance of such a permit may yield valuable data regarding the distribution and population size of the endangered Kemp's ridley sea turtle without increasing the number of takings, all of which now go unreported. However, this permit would have only limited success in alleviating the present problem because much of the shrimping activity occurs outside of the 3-mile territorial sea. Therefore, Department of Commerce may propose an amendment that would allow permits to be issued for the incidental taking of endangered species on the high seas.

Inconsistency between the MMPA and ESA.—Most of the endangered and threatened species under the jurisdiction of the Department of Commerce are marine mammals that also are protected under the Marine Mammal Protection Act of 1972 (MMPA). Under the provisions of the MMPA, permits for endangered or threatened marine mammals can be issued only for scientific research. The ESA contains other exceptions including the authority to issue permits for the enhancement of the propagation or survival of the species and for takings incidental to an otherwise lawful activity if such takings are not likely to jeopardize the continued existence of the species and specified mitigation measures are followed. However, since Section 17 of the ESA provides that any more restrictive and conflicting provision of the MMPA takes precedence, these exceptions of the ESA do not apply to endangered and threatened marine mammals.

Currently, NMFS is able to characterize certain recovery activities, such as the headstart program to reduce mortality among Hawaiian monk seal pups, as scientific research since the results of the program are unknown. However, once the program has been shown to be successful it becomes a management measure to enhance the survival of the species rather than research and an MMPA permit cannot be issued. Similarly, certain takings incidental to Federal activities that could be allowed under the ESA are now prohibited. For example, some seismic work conducted by the oil industry off the coast of Alaska could violate the ESA and MMPA if the noise generated results in the harassment of whales. Such a taking cannot be authorized under the MMPA although it could under the ESA.

To alleviate these inconsistencies, the Department of Commerce may propose an amendment to Section 17 of the ESA that would enable certain takings of endangered or threatened marine mammals to be authorized under the ESA without violating the MMPA.

Antique Articles Exemption.—The Department of Commerce also believes that the antique article exemption of Section 10(h) of the ESA needs clarification. The 1982 Amendments changed the exemption to articles more than 100 years old, rather than to articles made after 1830. This had been interpreted by some as meaning that only the endangered species parts, rather than the fashioned article, must be over 100 years old. A district court upheld our interpretation that the antique item must have been fashioned more than 100 years ago to fit under the exemption. Since this question may be the subject of further law suits, we may propose an amendment to clarify that the antique item must have been fashioned more than 100 years ago. This would be desirable both for identification purposes and to promote the goal of discouraging markets in more recently crafted endangered species parts. We may also propose that the provision be clarified to apply to antique articles in the United States as well as those that are imported because there has been confusion on the part of the public over the current wording.

Mr. Chairman, I believe that the Act has been working well with respect to marine species and urge that authorization of this Act be extended for a period of 4 years.

This concludes my prepared statement. I thank the Subcommittee for the opportunity to appear here today, and I will be pleased to answer any questions.

Mr. BREAUX. I thank both you gentlemen for your presentations.

Mr. Jantzen, I think the *Dion* case frankly just stinks. Is there anything we can do with that legislatively?

I remember Jim Watt coming up here and making a great fanfare about people taking the eagles, with all the pictures and everything else, and laying out all those eagles that were taken and killed for commercial purposes.

Now, as I understand it, basically the Court has said that we do not have the right to enforce against the taking of even endangered species, like the national bird, the bald eagle, on an Indian Reservation. That is absolutely contrary to every rational or reasonable principle that we are trying to adopt here.

Do you think we can fix that legislatively? We are darned well going to do it if we can. We have to stay one step ahead of the courts. It works both ways. When we legislate one day, somebody challenges it the next day and we are back over here trying to fix it. I am trying to see how we can fix it so they can't mess it up.

Mr. JANTZEN. Mr. Chairman, you know better than I that the Congress can fix something like that. We do not agree with the eighth circuit court ruling, either.

Mr. BREAUX. It is a disaster.

Mr. JANTZEN. We have asked for the Justice Department to proceed with a writ of certiorari.

Mr. BREAUX. Well, I don't want to comment on the case. They don't care what I think, anyway. Maybe you could have the general counsel's office down there prepare an amendment which in fact would clearly state that that type of law can be enforced on Indian Reservations.

I have been through this 1,000 times with Indian fishing rights and everything else; there is no way in good conscience that we should allow American citizens, of course, which they are, to be able to boldly violate the law on the illegal taking of the bald eagle. They are part of the United States also.

I would like some help and assistance from somebody to say what would we have to do to this act to insure that it in fact applies to everyone in this country and nobody should be exempt from it.

I am glad you are all appealing it. Lots of luck.

Mr. JANTZEN. Mr. Chairman, we would like to wait and see what the higher court does with it and then perhaps we will be back.

Mr. BREAUX. I would like to try to fix it right away, so if you can give us a suggested draft, not necessarily being in the position of the administration, but I will have our lawyers start working on it and I would like to have your office prepare something for us which would be a legislative fix of the district court decision. I know you have to appeal it and that doesn't necessarily reflect the position of the Department, but it is going to reflect my position and hopefully the majority of the members of the committee.

What about the wolf case? As I understand it, I thought in the law we could allow for the limited taking of a threatened species. I remember the alligator situation quite well where there was a taking that was accurately tagged and monitored.

This situation with the wolf, as I understand, is that you were allowing some taking of a species that was listed as threatened. I understand the arguments for it were because the population was getting fairly dense in an area and causing some problems, so you were allowing some taking of a threatened species.

The court, as I understand it, said no, you can't do that.

Mr. JANTZEN. That's correct. Our proposed regulations giving the State of Minnesota primary management jurisdiction also proposed there be a very limited take through sport trapping of wolves.

The court ruling, as I understand it, was based primarily on the term "population pressures in the definition of "conservation" under the Act." The Department contended that it does not need to base a regulated take on finding "population pressure." I believe the court has made a very narrow interpretation of the existing language.

As I pointed out in the wolf testimony, the recovery team recommended that this be allowed. The State worked very closely with us in developing the proposed regulations.

We were disappointed in the court ruling in the Eighth Circuit Court of Appeals holding, which upheld the lower court.

Mr. BREAU. Does that decision, if it is allowed to stand, give you problems in other areas where you have allowed some taking of threatened species?

Mr. JANTZEN. Yes, Mr. Chairman, it does. We can see a very potential impact on say the grizzly bear and a number of fishes in the west. These fish are listed that are threatened, and the incidental take of such fish is allowed as long as it is in accordance with State law. But it is not impacting adversely the populations. There are some good reasons for allowing the taking of some of these species.

Mr. BREAU. Do your people think this would affect the incidental taking of a threatened species, or just the targeted taking of a threatened species, like the wolf case was, as I understand it. Incidental taking would not be affected, would it?

Mr. JANTZEN. Mr. Chairman, could Don answer that?

Mr. BREAU. Yes.

STATEMENT OF DONALD J. BARRY

Mr. BARRY. Mr. Chairman, as you know, under the Endangered Species Act—

Mr. BREAU. You can just pull up a chair and sit right there. We always have to have the lawyers, no matter what we do.

Mr. JANTZEN. Mr. Chairman, before Don answers, if I could, I neglected and I apologize, to introduce Bob Gilmore, who is program manager for the endangered species program, and this is Don Barry, who is with the Solicitor's Office of the Department of the Interior, who works with the Fish and Wildlife Service.

Mr. BARRY. In the case of threatened listed species, there are frequently going to be instances where the Fish and Wildlife Service would care to have the discretionary authority to allow for the inci-

dental taking of a particular species. For instance, I know in the case of the fish that Bob Jantzen mentioned, we have listed a number of fish out west as threatened species and have included a provision that would allow their incidental take in accordance with State law. One of the reasons for that was to protect the innocent fishermen who threw their lines in the water hoping to get rainbow trout and snagged a Lahonton cutthroat trout instead.

Mr. BREAUX. Is there a difference between that type of incidental take and a targeted take, which would be in effect a season on a particular species? Wasn't that the situation with the wolf, that it was actually a hunting season of a threatened species and not an incidental take of that species?

Mr. BARRY. That is true. The standard for threatened species regulation under section 4(d) of the act is that they have to be regulations which are deemed to be necessary and advisable for the conservation of the species and I think the question in any one of these situations is whether or not the Fish and Wildlife Service can make a convincing administrative record at this point—make the case that in a given instance it is in fact in the best interests of the conservation of the species to allow either a regulated take or an incidental take. So I think, in answer to your question, you would have to take a look at the facts surrounding each single species and that the wolf case could affect incidental take regulations as well as regulated take regulations. You would have to take a look at the level of take that is occurring. There may be instances where the Fish and Wildlife Service may conclude for legitimate management reasons that a regulated take is appropriate. Similarly, there may be instances where they would conclude that it would be inappropriate to prosecute people for an incidental, unintentional take.

Mr. BREAUX. From a policy standpoint, why would it ever be necessary or appropriate or advisable to have a regulated take of a threatened species?

Mr. BARRY. I am going to defer to the biologists on that from a policy standpoint.

Mr. JANTZEN. From a policy standpoint?

Mr. BARRY. Yes.

Mr. JANTZEN. There are a number of animals, some of which are listed, some of which could be listed, say in the rodent family or the ungulates, where you may have high densities and subsequent disease problems, and where a regulated take would relieve that situation.

You also have to recognize that from time to time there are animals that are listed under the purposes of this act and protected under the purposes of this act that still can and do come into conflict with other human uses. Oftentimes a regulated taking can be a very economical and logical way to handle that situation and still protect the species.

Another reason, from a policy standpoint, at least from my personal viewpoint, Mr. Chairman, having come from a State background, as you know, is that the preemptive nature of the Endangered Species Act sometimes works against its goals as far as a State is concerned. If the act and the subsequent regulations under it can return some of the management reins, if you will, to the States, I think that the States then will feel more comfortable in a

partnership arrangement with the Federal Government. You have to keep in mind that they and their constituents oftentimes are those people who utilize wildlife and fish resources consumptively, but through regulated taking.

Mr. BREAUX. The State would never be able, I take it, to have a program that would allow the taking of an endangered species without the approval of the Fish and Wildlife Service? Would you always have that ability to say that their plan is just unreasonable in that it allows too generous a taking?

Mr. JANTZEN. Yes, sir, because we would be the ones who would publish the regulations which would transfer that authority back to the State. That is exactly the situation in Minnesota with the wolf.

Mr. BREAUX. From the standpoint of the Minnesota wolf case, is there something that you folks are thinking about recommending to the committee as far as legislation in that area, or do you plan to just run it through the appeals process, or what?

Mr. JANTZEN. No, Mr. Chairman, we are not at this time recommending any changes in that particular area. I am aware of some changes that are going to be recommended, I am sure, to the committee. We would like to take a look at those changes and we would want to work with the committee, but the administration's position is, at this time, not to request any changes.

There has been a decision made not to request an appeal. There was a suggestion made to go back and ask for an en banc hearing in the Eighth Circuit Court. That has been rejected and we are trying to let that situation mature a little bit.

We know that one of the options we have is certainly the ability to come to the chairman, come to the Congress, and ask for consideration of an amendment at any time.

Mr. BREAUX. Congressman McKernan of Maine, you may proceed.

Mr. MCKERNAN. Mr. Chairman, I just want to say your statement about staying one step ahead of the courts has a lot more meaning, your coming from Louisiana, than it may coming from the rest of us; but I just want to put in my 2 cents, coming from Maine, that I think we would concur with your statement that the *Dion* case really does seem to have things backward. I hope even if it is not the administration's position, that you can at least work with us to give us the language that will be necessary.

I want to ask a couple of questions.

I gather that the Interior Department was authorized \$27 million last year under this program. Is that true?

Mr. JANTZEN. Yes, Congressman. The last time the act was reauthorized, the authorization level under section 15(a)(1) was \$27 million.

Mr. MCKERNAN. And you are asking for \$23 million in reauthorization. Can you tell me what the difference is? Are there any programs that would be cut back or not funded with that \$4 million difference?

Mr. JANTZEN. No, Mr. Chairman and Congressman, the fiscal year 1985 appropriation which Congress has given us and under which we are operating now, is the level at which we are requesting the fiscal year 1986 budget. In other words, it is a level pro-

gram. We are requesting the same amount of money for next year as Congress appropriated to us this year.

Our testimony is based on that fact and we are asking for an authorization level at that level. We do not plan to cut back and we are requesting such sums as may be necessary in the 3 subsequent years. We are asking for a reauthorization period of 4 years.

Mr. McKERNAN. I am aware of that, so you are saying that even though when it was originally authorized at \$27 million, \$23 million was the actual funding level for 1985?

Mr. JANTZEN. Yes, sir, and the President's request for 1986.

Mr. McKERNAN. Mr. Gordon, I gather that you were authorized \$3.5 million. Is the \$2.775 that you are asking for what you were appropriated for 1985, or is that a reduction?

Mr. GORDON. That is a reduction. In 1985 we were at \$3.5 million for full authorization.

Mr. McKERNAN. What is going to be the effect of that reduction?

Mr. GORDON. We will have to withdraw some of the work that we have been doing in certain areas.

Mr. McKERNAN. What areas would those be, do you know?

Mr. GORDON. Probably some of the monk seal work in the western Pacific or some of the turtle work in the gulf.

Mr. McKERNAN. Anything farther north and east?

Mr. GORDON. What we have been doing in the Gulf of Maine and the Atlantic has been at a fairly low level and by and large has just involved providing some small whale research money to some of the universities and, of course, carrying on our law enforcement activities to reduce harassment of the species there.

We are deciding whether or not to withdraw the money for the universities to carry on that research on the whales.

Mr. McKERNAN. I gather that Mr. Bean from the Environmental Defense Fund is going to testify later that some species became extinct while they were on the candidate species list. Do you have any comment on that?

Mr. JANTZEN. Mr. Chairman and Congressman, we are aware that has happened in a couple instances. I think the majority of candidate species are in category 2, which requires additional information, basically.

Category 1 species are those which, at this time, we believe we have sufficient information to consider a proposed listing. However, even then when we propose that listing, oftentimes information will come forward which either confirms the original proposal or else might cause us to throw it out, because we found out more about the animals not being in the jeopardy that we once thought they were, so there is a continual screening process going on there.

It is possible in those areas that we are not aware of for animals to become extinct or get very jeopardized while they are on the candidate list.

By the same token, where we have been aware of, become aware of that situation developing, we have used the emergency listing process.

Mr. McKERNAN. That was going to be my next question, whether you have that procedure and if you feel that it is adequate, in most instances, to protect against that situation.

Mr. JANTZEN. Yes, sir. I think we are talking about a level of awareness more than we are the process itself, because we have the mechanisms available to us under existing law to throw in immediate protection through an emergency listing for 240 days. And, as I say, we have exercised it.

Mr. MCKERNAN. I have no further questions, Mr. Chairman.

Mr. BREAU. We have a falcon panel that is going to be testifying later on today. One of the things that I have seen is a so-called factsheet, which is somehow a creature of the Fish and Wildlife Service, and that factsheet contained the names of persons who had not been charged with any criminal violations but were subject to investigations. That factsheet somehow got outside of the Fish and Wildlife Service and was in fact published.

Do you have any comments about that. Someone who is under investigation is certainly not to be considered in violation of any crime or any act until that investigation is complete and the normal process is carried out. Do you have any comments about that?

Mr. JANTZEN. Mr. Chairman, yes, I have some strong feelings about it. If that is an internal document, it was not supposed to have been distributed. That is where I would come from with my strong feelings.

I am aware, I think, partially, of the information that you are talking about, but I have not seen it myself. And we do have Mr. Bavin here in the audience, Clark Bavin, who is our chief of law enforcement, who might be able to shed more specific light on what you have in front of you.

Mr. BREAU. Mr. Bavin, do you have any comment on that?

Mr. BAVIN. Mr. Chairman, I am not sure what document you are referring to. Could you be more specific?

Mr. BREAU. It is a series of documents that were listed in the Operation Falcon memo that we had, I guess a Fish and Wildlife Service document. I have seen it reported in publications and everything else.

Mr. BAVIN. Would you mind if I take a look at it? I am not sure. We have mounds of documents in this case, and I am not sure—

Mr. BREAU. Well, I will provide you the document. The document is from the Fish and Wildlife Service. We list a whole bunch of people who were apparently under investigation by the Department for the illegal taking, selling or transporting of falcons, contrary to the law. My concern is not the investigation. You should aggressively pursue investigations. I am concerned about the fact that apparently the documents containing names of people who have not been, as I understand it, found guilty of any violations or just subject of investigation are out in the public. It has been in The New York Times.

Mr. BAVIN. Well, I didn't read anything in the New York Times about it. The falconry community has brought to my attention two separate documents of which they have received copies. I am not sure that is one of which you have. In both instances the two documents were internal briefing papers and have not been released by me or anyone that I am aware of within the Fish and Wildlife Service. Obviously, it got out somehow.

Mr. BREAU. It got out somehow.

Mr. BAVIN. I do not know how it got out. If anyone else knows, we would certainly be pleased to have that information so we could pursue it.

Mr. BREAU. It is not something you should take very lightly, because everybody has the right to go through the legitimate process before they have all this spread out across the world.

Mr. BAVIN. Absolutely.

Mr. BREAU. It is something that you should try to send out, through some sort of internal inquiry, who is sending out your internal investigation material. That is really not appropriate, in my opinion.

Mr. BAVIN. Well, we agree with you, Mr. Chairman, 100 percent, and we would certainly welcome any information from people who have this document, if they would come forward and explain how they got it or where they got it we would certainly take appropriate action. At the moment we have no clue.

Mr. BREAU. I guess, Mr. Gordon, in 1982 Congress had the Commerce Department conduct a review of the regulations dealing with scrimshaw products from the exemptions and to submit a report to the Congress and to adopt revisions to the regulations by October 1, 1983 that were deemed necessary by the review.

Could you tell us the status of all that?

Mr. GORDON. We were somewhat tardy in getting on with that.

Mr. BREAU. A couple years.

Mr. GORDON. The prepared regulations were published in December, and we allowed 30 days for public comment. The final rules is currently at OMB for their sign off and clearance, and should be published very shortly.

Mr. BREAU. Are we still having problems with scrimshaw, as counsel on my Republican side tells me seizures of scrimshaw that were something like a couple hundred years old that just hadn't been carved yet, and apparently they were seized and people busted for doing it.

Mr. GORDON. We have had a number of problems in that area. There are, I think, 36 existing certificates of exemption for people who have pieces of scrimshaw or perhaps even uncarved components of endangered species, and who may wish to sell these items. However, the law governing such sales is fairly explicit. The new regulations will certainly facilitate enforcement but I don't think it will make these people very happy because the law—and you folks beefed it up—will require additional recordkeeping, and the like, if we are going to maintain control of these items.

Mr. BREAU. The regulations that will be published—it is 2 years late already—but the point I want to make is, are they going to be effective without any further actions by the Congress?

Mr. GORDON. We think so, yes, sir.

Mr. BREAU. We might have to take a look at them, in light of some of the problems. From a practical standpoint, if the stuff was taken a couple hundred years ago, I don't really have a lot of problems with the fact that we cannot document that, if it was done before the law was passed. We ought to be able to allow for the handling of that and not just dismiss it or throw it away.

Mr. GORDON. We think that some people have as much as 10,000 pieces of this stuff, which can be converted into an awful lot of

product. If you think about tie tacks and things of that nature, hundreds of pieces of jewelry or artifacts could be made from a pound of the original product part.

Mr. BREAUX. What is the position of Commerce or the administration with regard to that? Should that be left alone, should that be banned, should we work out some kind of a system to handle that? It is an awful enforcement problem, as I understand.

Mr. GORDON. What we are suggesting in our proposed regulations is that people who hold certificates be required to maintain a detailed inventory of all of the parts that were covered by these certificates, including a description of the product and the weight of the product, and to identify each item by a serial number and affix that number to any items made from the original product. A quarterly report would then be submitted to us showing the items that were sold during the quarter.

I guess it is somewhat like gun control, they keep a lot of records, and people are perhaps not very happy with it. But we think that the procedures will bring some degree of control over the situation.

Mr. BREAUX. There are only 36 licensed dealers who are allowed to deal in scrimshaw products?

Mr. GORDON. We currently have 36 certificates existing, yes, sir.

Mr. BREAUX. I think I have walked through more than 36 shops just in Hawaii, probably. Are all of these little scrimshaw products you see in these types of hotel stores, are they all operating illegally if they are selling scrimshaw?

Mr. GORDON. They can sell intrastate without any problem. A lot of the stuff you see is fake, anyhow.

Mr. BREAUX. Ah.

Mr. GORDON. There is a lot of duplication. That is another enforcement issue. There is a lot of plastic.

Mr. BREAUX. Plastic scrimshaw.

All right. We need to work with all of you and your counsel. We have asked for some things from the general counsel's office as we develop this legislation. I would hope that we would be able to continue to work together. We may have some additional questions that we will have to submit to both you gentlemen and your people, and hopefully we can get a timely response back.

Thank you.

Mr. GORDON. We will be happy to work with you, Mr. Chairman.

Mr. BREAUX. I would like to welcome at this time the next panel which consists of Mr. Michael Bean, chairman of the Wildlife Program, Environmental Defense Fund; Dr. Michael Zagata, who is the manager of engineering ecological sciences, for Tenneco, Inc.; Mr. Ron Marcoux, who is associate director for the Montana Department of Fish, Wildlife and Parks; Mr. Tom Pitts, coordinator for the Colorado Water Congress Special Project on Threatened and Endangered Species; Dr. Robert Davison, legislative representative for the National Wildlife Federation; and Mrs. Niels Johnsen, who is president of the Garden Club of America.

If all of you will please take your seats, we would be pleased to receive all of your testimony. We have a big group, and if you will find your seat, we will proceed.

All right, Mike, we have you listed first. If you would like to go ahead, we will take your testimony.

STATEMENTS OF MICHAEL BEAN, CHAIRMAN, WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE FUND; DR. MICHAEL ZAGATA, MANAGER, ENGINEERING ECOLOGICAL SCIENCES, TENNECO, INC.; RON MARCOUX, ASSOCIATE DIRECTOR, MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS; TOM PITTS, COORDINATOR, COLORADO WATER CONGRESS SPECIAL PROJECT ON THREATENED AND ENDANGERED SPECIES; DR. ROBERT DAVISON, LEGISLATIVE REPRESENTATIVE, NATIONAL WILDLIFE FEDERATION; AND MRS. NIELS JOHNSEN, PRESIDENT, GARDEN CLUB OF AMERICA

STATEMENT OF MICHAEL BEAN

Mr. BEAN. Thank you very much, Mr. Chairman. It is a pleasure to be here. I am testifying today on behalf of the American Cetacean Society; the Center for Environmental Education; Defenders of Wildlife; the Environmental Defense Fund; Greenpeace, USA; Humane Society of the United States; I Kare Wildlife Coalition; Natural Resources Defense Council; Society for Animal Protective Legislation; and the Wilderness Society.

I will not read my statement. I would like to summarize it instead.

This is the first opportunity this subcommittee has had to look back at more than a decade of experience with the Endangered Species Act. As Mr. Jantzen has indicated in his testimony, there are some important accomplishments that have been made in that decade and a year, accomplishments that have been made for a very modest amount of money.

It is true, as well, that the 11 years that the act has been in place is not a very long time, and it may be unrealistic to expect a great many more accomplishments in that short period of time.

It is also true that much more, substantially much more, could be done with more resources for this program.

Although 11 years may be a very short time in which to judge the act or in which to expect to achieve success in recovering some of our endangered species, it is very definitely not a long time in terms of how long it takes to lose some endangered species.

My testimony gives some dramatic examples of that. As Mr. McKernan indicated in his questioning of Mr. Jantzen a moment ago, there have been in the last several years a number of candidate species, these are species that the Fish and Wildlife Service has identified as long as 4 or 5 years ago as deserving to be proposed for listing, that have gone extinct. They are identified in my statement. There are many others that, though not yet extinct, have declined so seriously in numbers or range that by the time they are ultimately listed, if they are ever ultimately listed, the options that remain to bring about their recovery will be so reduced and so few that we are likely to spend much more money pursuing much more controversial, and much less likely to be successful, solutions than if we could list them quickly now and had the resources to do that.

Mr. Jantzen's answer to your question, Mr. McKernan, about the emergency authority that the Service has is not entirely satisfactory. There are, in fact, far more examples of candidate species that have actually gone extinct or have declined seriously to the point of near-extinction than there are examples in which the Service has used its emergency rule-making authority.

The listing of species in order to eliminate the large backlog of candidate species known to be eligible for protection will require substantially more resources than are currently devoted to that function. So will the recovery of species.

Again, in Mr. Jantzen's testimony, much credit is taken for the fact that some 51 recovery plans have been developed for listed species in the past year.

Recovery plans are pieces of paper. They do nothing to bring about the recovery of species. Rather, they identify the actions that are necessary to accomplish that recovery. In every instance those actions are going to entail some amount of cost. In some instances, the cost is considerable. Yet the amount of resources going into recovery implementation, as opposed to the writing task of recovery plan preparation, is clearly too small to prevent the further loss of many already listed species. And indeed I have identified in my statement a number of those species that, since being listed for protection under this act, have declined seriously in range or numbers. And, indeed, one recent example is apparently the first species to have become extinct while listed as an endangered species.

A third area in which more resources are clearly needed than are now provided under the act pertains to the State Cooperative Grant Program under section 6.

Mr. Gordon, in his testimony, announced the fact that the National Marine Fisheries Service recently entered into its first section 6 cooperative agreement with the State of South Carolina. He forgot to mention that the National Marine Fisheries Service has no money with which to carry out that agreement.

On the Fish and Wildlife Service side, the amount of money available today for support of section 6 cooperative agreements is the same amount of money as was provided in 1977, the first year in which there were State cooperative agreements under section 6, the same amount of money, that is, if you ignore inflation.

If you take inflation into account and if you take into account, as well, the fact that there are roughly four times as many State cooperative agreements today as there were in 1977, what you have to conclude is that each State is getting a smaller and smaller slice of a smaller pie under section 6. In fact, the amount of money available under section 6 per State cooperative agreement is more than 80 percent less than that which was provided in 1977, the year of the first cooperative agreement.

There is a further problem with section 6 that my testimony describes in some detail, and that is the fact that the Fish and Wildlife Service has used inconsistent and conflicting criteria in approving State requests for cooperative agreements, the net effect being that a number of States that apparently ought to have qualified by now for cooperative agreements have been unable to do so because of inconsistencies in the application of the criteria by the Fish and Wildlife Service.

So section 6 is another area where the resources today are simply insufficient to prevent the loss of listed species.

A further area worth mentioning because of remarks in Mr. Jantzen's testimony concerns the consultation function. Mr. Jantzen noted that this year he expects what he described as a "high total" of new listings because of some 68 listing proposals that are currently outstanding.

He also notes that the number of consultations increases with the number of species that are listed. Indeed, if the species now proposed for listing are listed this year, as most of them probably will be, the total number of U.S. species which, after all, are the only species for which the Fish and Wildlife Service consults, will be increased by about 20 percent.

One might expect, therefore, the administration to seek a request in the consultation budget of about 20 percent, but in fact the request is constant, actually a few dollars less than last fiscal year.

The net effect of that is going to be that the quality of consultation will inevitably decline. I am sure you are going to hear from other panelists this morning that the quality of some consultations is already pretty low. It will get worse if the resources available for that function do not keep pace with the needs.

We have estimated in our statement that the needs that can justifiably be identified to make this program work would cost in the order of two to three times the very modest amount of money that currently is provided for this program.

Mr. Lowry in his questioning of Mr. Attenborough made what I think was a very good suggestion, that perhaps we ought to be thinking about a dedicated fund that would make those resources available to this program.

In addition to those points about the resources that are necessary, there are a couple substantive issues that need to be addressed by your committee, a few that I would consider rather minor but nonetheless important amendments.

The first pertains to candidate species. In addition to the need to get them listed more expeditiously, there is a need in the interim to provide some limited means of protection for them so that we do not continue to watch them disappear, helpless to do anything about it.

The act as it now reads provides absolutely no protection for candidate species. The act does provide very limited protection for species that have been proposed for listing once they are proposed. That protection takes the form of an informal conferral process by Federal agencies.

It seems to me that the candidate species, particularly the category I candidate species, which are species that the Fish and Wildlife Service has found qualified to be proposed for listing and that would be proposed for listing but for the lack of resources to do so, should receive the same treatment that proposed species now receive.

Secondly, the protection for plants is inadequate. Currently the only protection against taking that plants receive is protection against collecting on Federal lands. Many species of endangered plants do not occur on Federal lands or do not occur in their en-

tirety on Federal lands and are subject to collecting where they do occur.

We have proposed what we think is a very innovative and useful solution to the plant taking problem. That is to enlist the support of the many landowners who take pride in the fact that their lands harbor endangered species and who are willing cooperators in the effort to conserve them by giving them the backing of this act against those who trespass on their lands and take plants from their lands without permission. We propose a very modest change in the section 9 of the Endangered Species Act to prohibit the collecting from non-Federal lands of endangered or threatened plants by persons acting without the consent of the landowner. That is a modest half-way step between the protection now afforded plants and that now afforded animals.

On the subject of raptors, I will not say anything other than I have read the testimony of James Leape of the National Audubon Society, that he will deliver later today, and concur with it completely.

I have just a few words about the wolf decision. I do not believe that the wolf decision of the Eighth Circuit affects incidental taking at all, nor does it, by its own terms, affect what degree of authority the Fish and Wildlife Service may have over experimental populations. Nor, contrary to Mr. Jantzen's assertions, does it in any significant way limit what the Fish and Wildlife Service can do to remove diseased animals. Indeed, the Eighth Circuit opinion is quite explicit that the authority provided by section 10(a)(1) is available to remove diseased animals and to remove predating or depredating animals. It is a very narrowly-defined decision that only says that sport hunting is not a permissible means of conservation under the act's definition of "conservation" unless population pressures exist that make it appropriate.

The last point is that the court did not address the question whether population pressures of that character even existed. That was not before the court and not decided because the Fish and Wildlife Service had never justified the sport hunting program on that basis.

The final point I would like to address is the question of western water. I want to bring to your attention that there has been submitted for the record a joint statement by the Environmental Defense Fund, Trout Unlimited, Friends of the Earth, Sierra Club, and the Colorado Audubon Council. It is a statement that I think is very consistent with Mr. Davison's statement this morning from the National Wildlife Federation, but I want to call it to your attention because it is a product of representatives of those organizations who live and work in the West and are very familiar on a firsthand basis with the unique problems that exist there.

Thank you very much, Mr. Breaux.

[The prepared statement of Michael Bean follows:]

PREPARED STATEMENT OF MICHAEL J. BEAN, ON BEHALF OF AMERICAN CETACEAN SOCIETY, CENTER FOR ENVIRONMENTAL EDUCATION, DEFENDERS OF WILDLIFE, THE ENVIRONMENTAL DEFENSE FUND, GREENPEACE USA, HUMANE SOCIETY OF THE UNITED STATES, NATURAL RESOURCES DEFENSE COUNCIL, AND SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION

This is the first opportunity this subcommittee has had to examine closely the results of more than a decade of experience in implementing one of the most important laws for which it is responsible, the Endangered Species Act of 1973. There are today, as there have been in the past, at least a few controversies under this Act that stir the passions of those most immediately affected by them. Others will no doubt endeavor to persuade the subcommittee to give its full attention to these controversies.

There are, however, more urgent and more fundamental questions to be addressed. The most basic of these is whether the Act is achieving, or is even capable of achieving, its very purposes. The testimony that follows attempts to make an objective and balanced appraisal of that question. Its conclusion is that, despite a few significant successes, the program established by the Endangered Species Act is failing seriously to meet that Act's objectives. Even within our own borders, species that could be conserved without heroic and extravagantly expensive measures are being lost, or are being made much more vulnerable to loss, principally as a result of insufficient resources available to the program.

The testimony that follows calls for several measures to improve the effectiveness of the endangered species program. The most important of these is for a major increase in the funds available to implement it. In so recommending, one cannot be oblivious to the chorus of calls for reducing, rather than expanding, federal programs generally. Before heeding that chorus, however, one must acknowledge that the most successful national investment in conservation was the product of a time in our country's economic history far more desperate than today. In the very depths of the Great Depression, with massive unemployment, a shrinking tax base, and declining gross national product, Congress took the remarkable step of diverting existing federal revenues from the general treasury into a special fund that could be used only for the conservation of game. That Depression-era program, the so-called "Pittman-Robertson" program, has made possible successful game conservation for half a century, though it must have seemed utter folly to most people in light of the extraordinary social and economic problems confronting the country at the time of its enactment.

The crisis confronting wildlife is far greater today than during the Depression or at any prior time in our history, yet the country's ability to support essential conservation programs is much greater than when the Congress of a half a century ago had the vision to pass the Pittman-Robertson Act. Unless we exercise the same vision and foresight today, our nation's temporary economic difficulties will be the excuse for suffering permanent and irreversible damage to the valuable biological heritage we leave to our children and grandchildren.

I. AN APPRAISAL OF THE ACT'S SUCCESSES AND FAILURES

Determining the success or failure of the endangered species program to date requires at the outset that an appropriate measure of success be utilized. Although no single measure is entirely satisfactory, there are some obvious indicia that are helpful in making that judgment. Clearly the most obvious of these is the recovery of a listed species to the point at which it no longer needs to be listed or to the point at which it can be reclassified from "endangered" to the less imperiled "threatened" category. There are now a small number of such successes, although in most cases the recovery cannot be attributed primarily to the Endangered Species Act. The recently reclassified brown pelican, for example, owes most of its recovery not to the Endangered Species Act, but to the banning of certain highly toxic and persistent pesticides, as do the recovering, but still endangered, bald eagle and peregrine falcon. Other species, like the Florida pine barrens tree frog and the snail darter, have been reclassified to less protected categories as a result of discovering that they were in fact more widespread and abundant than was believed at the time of their original listing. Similarly, the American alligator, though now reclassified from endangered to threatened throughout much of its range, had begun its recovery well prior to the enactment of the Endangered Species Act. Indeed, Louisiana officials have consistently maintained that their state's population of alligators had already fully recovered by the time of the Endangered Species Act. The slow but steady recovery of the whooping crane over the past decade also continues a recovery process that began several decades earlier.

These examples are not intended to suggest that the Endangered Species Act has had no important role in aiding the recovery of these species, or that other species not yet recovered have not benefited significantly from the Act by virtue of actions taken to halt or slow their decline. They do suggest, however, that there are very few examples as yet of species recovery that can be attributed primarily to the endangered species program.

Against that small handful of species whose recovery can be documented, there is a large and growing number of species that have continued to decline since passage of the Endangered Species Act. The problem is perhaps most acute with respect to the so-called "candidate" species that are known to be eligible for protection but that still receive none. Since 1973, the list of threatened and endangered species has grown by about 429 species, an average of 39 per year. Yet, the U.S. Fish and Wildlife Service has identified, from within the United States alone, more than a thousand additional species for which it already has sufficient information warranting proposals to add them to the list. Such proposals cannot be made currently, however, because of inadequate resources. If this backlog of "category I candidate" species is to be handled at a rate equal to the historical average (a dubious assumption since the average number of new listings over the past four years has been less than half the historical average), more than a quarter century will be needed just to extend protection to those species already known to need protection now.

Unfortunately, many of these cannot wait another quarter century. Already, the examples are many of species that have suffered serious declines since being identified as needing protection. The Texas Henslow's sparrow, for example, apparently went extinct within the past year, even as the Fish and Wildlife Service was endeavoring to decide whether it should be listed. Likewise the Wyoming toad, though formally listed as endangered in 1984, was apparently already extinct by then; at least a few dozen were known to survive only four years earlier. In 1979, the Governor of Guam petitioned for the listing of that island's native birds. Five years later, when the listing was finally accomplished, it was already too late, or nearly so, for many of the birds. The Guam bridled white-eye, for example, still numbered about 2,000 as recently as 1981, two years after the Governor's petition, but by the time of listing it was extinct. The Guam rail had declined from similar levels to only about 25 birds in the wild; Guam authorities believe it is now no longer possible to preserve it in the wild and are endeavoring to catch the wild birds for a last-ditch captive propagation effort. For the Guam broadbill, not even that hope remained by the time of the listing; only a few males are thought to have survived the Interior Department's ponderous decision-making.

The Modoc sucker, a California fish, has been of concern to the Fish and Wildlife Service since 1966. As recently as 1978 it occurred in at least eight different streams. By the time it was proposed for listing in 1984, it had been eliminated from five of those streams. A similar decline was experienced by the Selkirk herd of woodland caribou, the last population of the species regularly occurring in the Lower 48. In 1981, an estimated thirty animals comprised this population. Despite being petitioned to list it for protection, the Fish and Wildlife Service delayed doing so until 1983, when the population had dwindled to fewer than twenty. Indeed, the Service did so then only in the face of a threatened lawsuit by the National Audubon Society.

The problem described here is by no means limited to animals. The Smithsonian Institution, in a comprehensive 1975 report, identified a large number of native plants needing protection. A decade later, only a handful of them have yet been protected and many have continued their steady slide toward extinction. For example, the Arizona agave, a desert succulent, occurred at a dozen or more different sites as recently as 1980; today, a single site, with just three plants, remains. Another rare plant, the Bradshaw desert-parsley, was known to occur in healthy populations at six different locations in the Pacific Northwest in the late 1970's; since then, all but one has been destroyed and that one is of marginal viability. For the Koehler's rock cress, a denizen of rocky ledges in Oregon, six of its known populations have been destroyed since 1979.

In New Jersey, the Fish and Wildlife Service stood helplessly by recently while a developer under an Army Corps of Engineers permit destroyed one of the few colonies of the spreading globeflower, a striking wildflower that has been a candidate for listing for several years. Because it had not yet been listed, the Fish and Wildlife Service could not prevent its destruction and the Army Corps would not. The examples go on and on.

In each of these examples, and in many others like them, the serious declines that occurred subsequent to the identification of the species as needing protection meant that by the time of listing, if the species still survived at all, the range of conserva-

tion options had narrowed drastically. In most cases, the easy and inexpensive options have been lost; the opportunity to experiment with a variety of different approaches has been precluded. All that remains to be tried are desperate last-ditch efforts more likely to be expensive and controversial than successful. With a significant additional investment today to accelerate the listing of species already known to be in need of protection, the need to choose between expensive conservation actions and species loss will be less frequent in the future.

Of course, merely listing a species as threatened or endangered offers no guarantee of survival. In the past year, the Palos Verdes blue butterfly, a California species listed as endangered in 1980, apparently went extinct as the last of its known habitats was bulldozed. Further up the California coast, the Lange's metalmark butterfly population has declined by more than half since its listing as endangered in 1976. In Florida, the Schaus' swallowtail butterfly was recently reclassified from threatened to endangered due to declines in both its numbers and range since its 1975 listing. Elsewhere in Florida, the dusky seaside sparrow, federally protected since the nation's first endangered species legislation in 1966, now faces certain extinction as only a handful of males survive. The California sea otter, a playful mammal of the central California coast, may be declining in numbers after having been listed as threatened in 1977.

These examples underscore the fact that the listing of a species is just the first step toward its recovery. Without more, extinction is unlikely to be avoided. The current Administration has widely touted the fact that it has produced more "recovery plans" for listed species than any that preceded it. But recovery plans, like prescriptions for medicine, are pieces of paper. Unless one buys the medicine prescribed, recovery will not result. In virtually every example, the plans call for actions not yet taken, like the establishment of a second population of California sea otters, called for in a 1982 recovery plan but still not under way. They also call, in many instances, for acquisition of habitat, yet little progress has recently been made on this front.

Also key to the success of recovery efforts is the active cooperation of state conservation agencies. Many states, encouraged by the Act's promise of financial assistance for cooperative conservation programs, responded by developing a host of worthy and much-needed conservation projects that, for want of adequate and predictable assistance, could not be carried out. For example, states with cooperative agreements under Section 6 of the Act have consistently sought two to three times the amount of federal assistance that has been available for that purpose. More and more states have developed cooperative agreements, but without any corresponding increase in the size of the Section 6 pie. In fact, each state program's slice has shrunk on average by 80 percent in constant dollars since 1977, and, as a result, a majority of the listed species in the United States have yet to be aided at all by expenditures under Section 6. Attachment 1 illustrates graphically the erosion of federal support for state programs under Section 6. In light of the small and uncertain sums available for assistance, states are losing the incentive to develop the programs the Act was designed to encourage. Nebraska, for example, has decided not to seek a plant cooperative agreement because it sees insufficient prospect for adequate financial assistance under Section 6.

Looking beyond our borders, the situation is even more bleak. The training, technical assistance and other aid that the United States could provide and that would truly demonstrate a commitment to the worldwide protection of endangered species have been virtually nonexistent. At the same time, both the numbers of species at risk and the practical costs of species loss for medicine, agriculture, and industry are undoubtedly far greater beyond our borders than within them.

Inevitably, the conclusion that must be drawn is that the goals of the Act have not been met and cannot be at the level of resources currently provided. That is not the fault of the current Administration or of any single Administration that preceded it; never have the resources available been commensurate with the need.

II. THE MOST PRESSING NEED: MORE RESOURCES

From the preceding discussion it is clear that if one takes seriously the goals and objectives of the Endangered Species Act, substantially greater resources will have to be made available to attain them. At present program support levels, the list of the Act's clear failures will grow rapidly and likely overwhelm the few successes that the program can claim. The choices available to the Congress are few: either scale back the purposes and objectives of the program so that they are capable of being attained at present support levels or increase that support so that existing

purposes and objectives have a realistic chance of being met. The only alternative is to perpetuate the fiction that no serious problem exists.

Obviously, we believe that the purposes and goals of the Endangered Species Act are vitally important and that to back away from them would be both short-sighted and, in the long run, very costly. The responsible path, we believe, is to make the investment necessary now to give the program an opportunity to succeed. To have that opportunity, the program must be given sufficient resources to complete listing action on the already identified "category I candidate" species, not within another quarter century but within the next decade. It must be given sufficient resources to make possible not just the writing of recovery plans but their expeditious implementation. It must be given sufficient resources to enable the states to enter into a new partnership with the federal government, not just to remain as disaffected stepchildren in the overall conservation effort. Finally, it must be given sufficient resources to begin to address in a meaningful way the urgent problem of species loss beyond our borders. Attachment 2 sets forth our calculation of what such an opportunity to succeed is likely to cost. The total of \$80-90 million yearly is more than double the current authorization ceilings, but is still small when compared to the cost of other programs of no clearly greater urgency.

III. OTHER NEEDS: PROVIDE LIMITED INTERIM PROTECTION TO CANDIDATE SPECIES

Currently there is a large backlog of U.S. species that have been formally identified by the Fish and Wildlife Service for future listing action but that are not likely to be proposed for listing anytime soon because of the Service's resource limitations. These candidate species receive no legal protection whatsoever under the Act, yet many are known to have declined seriously, even to the point of extinction, since being identified as candidates. Limited interim protection for these species would not only aid their conservation but may also benefit economic interests affected by the Act. That is, such interim protection may make the eventual listing of the species unnecessary or, at the least, preserve less expensive and less controversial conservation options for the species when it is finally listed.

One mechanism for providing a limited sort of interim protection to candidate species is to treat them as "proposed" species for purposes of Section 7(a)(4) of the Act. That provision requires agencies to "confer" with the Secretary about planned action that are likely to affect adversely such proposed species. Conferral is a less formal and more flexible process than the "consultation" process that applies to listed species. Candidate species should enjoy at least as much protection as species proposed for listing because the Secretary has already determined that, but for his own resource limitations, such species would in fact have been proposed.

In addition to treating candidate species as species proposed for listing, the standard that triggers the duty to confer should be modified. Currently, the duty to confer applies only with respect to actions that are likely to jeopardize the continued existence of the species or destroy its proposed critical habitat. That standard is far too rigorous because it assumes the very conclusion of the question that the conferral process is intended to examine. A more appropriate standard would require conferral for any action that is likely to affect adversely the continued existence of any proposed or candidate species.

IV. OTHER NEEDS: PROVIDE LIMITED ADDITIONAL PROTECTION FOR LISTED PLANTS

Listed plants receive the same protection as listed animals, with one key exception. Whereas the Act broadly prohibits the "taking" of any endangered animal anywhere by any means, only a very narrowly circumscribed prohibition applies to the taking of listed plants. Specifically, only listed plants on federal lands are protected from taking, and then only when the taken plant is "reduced to possession" by the person taking it. In simpler language, that means vandals can cut, uproot or otherwise destroy endangered plants on federal lands without violating the Act. On private and other non-federal lands, the Act does nothing to prevent vandals, collectors, and others from destroying or collecting imperiled plant species.

Mounting evidence shows that effective plant conservation requires more than the Act provides. Many listed or candidate plants have been seriously reduced through overcollecting, including the Chapman's rhododendron, certain cacti and insectivorous plants of interest to hobbyists. Vandalism directed against endangered plants is also a problem for certain species such as the Virginia round-leaf birch tree.

Many landowners have willingly cooperated in the conservation of rare plants occurring on their property. But the Endangered Species Act does little to reinforce the cooperative spirit of these landowners. Trespassers who enter private property to take or vandalize endangered plants do so with no fear of the stiff federal penal-

ties that apply to those taking endangered animals. Instead, only generally ineffectual state trespass laws apply. We therefore recommend that § 9(a)(2) of the Act be amended to prohibit the malicious destruction of listed plants wherever they occur and to prohibit the removal of listed plants from non-federal lands except with the express consent of the landowner.

V. OTHER ISSUES: THE ACT'S CONSERVATION STANDARD

The United States Court of Appeals for the Eighth Circuit, in the recent case of *Sierra Club v. Clark*, had occasion to consider the Act's conservation standard. Its ruling, that the Secretary of the Interior, in the absence of special circumstances, was constrained by that standard from authorizing the sport hunting of the wolf, a threatened species, has apparently generated some concern as to its reach. In evaluating that concern, it is important to examine the court's decision closely.

First, the court did not limit the Secretary's authority to take or authorize the take of predating or depredating animals in order to protect life or property. Indeed, the court left open two different means by which this can be accomplished; general regulations authorizing predator control activities and special permits under Section 10(a)(1)(A) of the Act. The latter authority is equally applicable to both threatened and endangered species. Thus, the often proffered argument, that effective control of endangered or threatened predators is necessary to sustain public support for their conservation and deter vigilantism, can be accommodated under the court's opinion.

Neither does the decision limit the Secretary's discretion with respect to species that are part of an "experimental population". Instead, the court very clearly refrains from reaching any conclusion on that issue. Thus, the very narrow decision of the Court is that the Secretary may not authorize sport hunting of a non-experimental, threatened species unless, as the Act's definition of "conservation" specifies, extraordinary population pressures cannot otherwise be relieved. That narrow prohibition will have virtually no impact on sport hunting in the United States because most hunted species do not face the threat of extinction within the foreseeable future. For a species that does, however, and is thus listed as threatened, the original drafters of the Act properly concluded that sport hunting of it would not be an objective of its conservation, but rather a permissible means, in very limited circumstances, of securing its conservation. Absent any new and compelling basis to reconsider that judgment, the conclusion reached in 1973 should be continued.

VI. OTHER ISSUES: THE ACT AND WESTERN WATER

Another issue likely to be raised before the subcommittee concerns the effect of Section 7 of the Act upon federally authorized or funded water projects in Western states in which the "prior appropriation" doctrine prevails. The complaint of certain Western water users is that under their state laws they may own the right to withdraw or consume a specified quantity of water yet be unable, because of Section 7, to secure the necessary federal permits to construct the dams or other diversion facilities that would facilitate the exercise of those rights. In this respect, however, it is clear that Section 7 threatens property rights in Western water no differently than it treats other property rights elsewhere. All are subject to limitation where federal agency approval is necessary for any activity relating to the exercise of those rights.

What is unique about the Western water law scheme is the extraordinary way in which it has been designed to frustrate almost totally any effort to conserve biological resources dependent upon flowing water. No sophisticated understanding of biology is necessary to appreciate the fact that if all the water is taken from a stream, the fish in that stream will perish. Yet, under traditional western water law principles, only those uses of water that result in removal of water from its natural stream are recognized as "beneficial" uses and thus entitled to legal protection. Maintaining in-stream flows, even the minimal amounts necessary to avoid species extinction or promote other conservation objectives, has not traditionally been considered a beneficial use and thus is not a legally protected use under the state law schemes. Thus, both public and private conservation interests, like the Nature Conservancy, that have so successfully competed in the marketplace to purchase and conserve land, have been legally unable to use the market to acquire water rights necessary to protect fish or other aquatic resources. Although a minority of Western states have recently enacted laws to recognize certain in-stream uses as beneficial water uses, the deck has been stacked so heavily for so long against conservation interests that today's desperate plight of many western fish species has been made inevitable. Absent some very fundamental reform in the state legal schemes that

have created this dire situation, the limited handle of Section 7 of the Endangered Species Act remains the only significant safeguard against species extinction.

VII. OTHER ISSUES: THE FRUSTRATION OF SECTION 6

A final issue that merit the subcommittee's close attention is the serious frustration of the state cooperation goal of Section 6. There are two aspects to this issue. One, the paucity of funding with which to implement Section 6, has already been examined. The second aspect is less obvious but nearly as important. It concerns the inability of the Fish and Wildlife Service to articulate and follow a consistent set of standards in reviewing applications by the states for cooperative agreements. This problem is most serious with respect to plant cooperative agreements because as yet only fifteen states have such agreements.

A few examples illustrate the nature of the problem. Ohio has been endeavoring unsuccessfully since 1980 to secure a Section 6 cooperative agreement for wildlife. A major stumbling block has been the Fish and Wildlife Service's objections to a provision of Ohio law that authorizes permits for otherwise prohibited activities for "zoological and educational purposes." The Service contends that because these are not among the limited purposes for which permits may be issued under the federal Act, the state is ineligible for a cooperative agreement. However, the Service has approved cooperative agreements with South Dakota, Wisconsin and Michigan on the basis of state laws containing provisions virtually identical to that of the Ohio law.

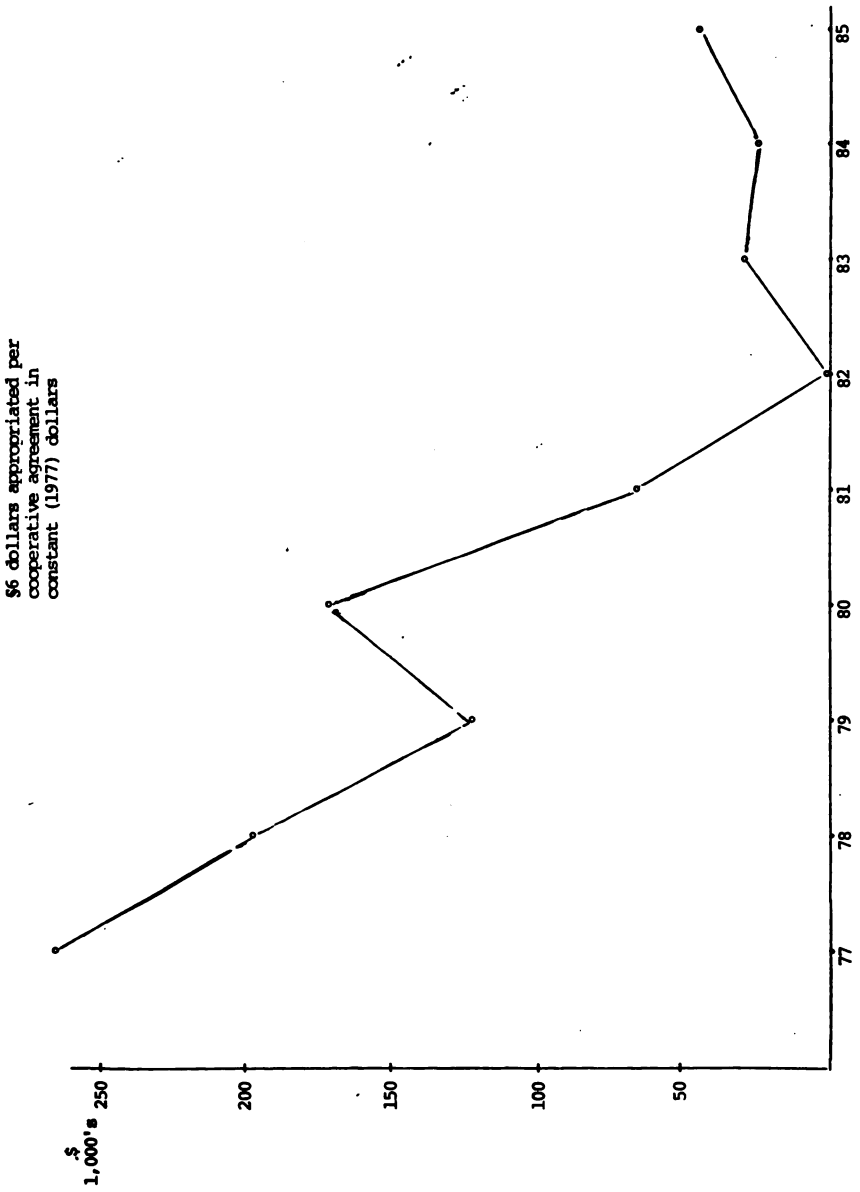
A similar example of inconsistency by the Service concerns Vermont, frustrated in its efforts to obtain a plant agreement for the past three years. The Service has objected to the state law's definition of the term "wild plant," even though a virtually identical provision in California law posed no problem when that state's application for a cooperative agreement was approved. The Vermont example also illustrates a remarkable triumph of form over substance. Vermont law extends far more significant protection to endangered plants than does the federal law. Its plant taking prohibition is broader both geographically (because it applies to all lands, not just federal lands) and substantively (because it extends to all takings and not just collecting). Indeed, the federal law gives no taking protection to any plant in Vermont because none of the listed plants there occur on federal land. Yet, the Fish and Wildlife Service rejected the state's application for a plant cooperative agreement because the state law imposes a "knowing" standard of culpability whereas the federal law imposes no such standard.

The case of Virginia illustrates the Fish and Wildlife Service's inability to comprehend the significance of the 1979 amendments to the Act authorizing "limited authorities" cooperative agreements with states whose laws do not provide authority for conserving the full range of species subject to the federal Act. The Service has taken a view in reviewing Virginia's application that would effectively render all states ineligible for limited authorities agreements. In its view the requirement for a limited authorities agreement that a state give immediate attention to those species jointly determined to be in most urgent conservation need means that a state without authority to conserve all species cannot ensure that it will give immediate attention to those species that the Service thinks have the most urgent conservation need. Thus, the very purpose of Congress' 1979 amendments relaxing the eligibility requirements for Section 6 agreements is negated.

In Massachusetts, the Service has insisted that the state's application be accompanied by a formal opinion of the state Attorney General rather than the Division of Wildlife and Fisheries, even though under state law the Division is empowered to interpret its statutes and regulations and the Attorney General defers to that interpretation. As a result, the state's efforts to secure a plant cooperative agreement appear stalemated.

These many examples, and others that could be cited, clearly show that many of the states are justifiably frustrated and confused by the vacillation and inconsistency of the Service in administering the Section 6 program. It is not clear yet that any amendments to Section 6 are needed to remedy this problem. It is clear, however, that the subcommittee should press the Service very hard to eliminate these problems and follow a clear and consistent set of criteria in reviewing Section 6 cooperative agreement applications.

ATTACHMENT 1



ATTACHMENT 2

Set forth below are the estimates of budgetary needs for the federal endangered species program based upon realistic objectives that would represent achievement of the goals of the Endangered Species Act.

LISTING

- goal: finish listing action on current backlog of 1019 category 1 candidate species in next ten years
 cost: assumes same cost per newly listed species as prevailed in 1984

5.75M/yr

- goal: complete status surveys on current backlog of 2711 category 2 candidate species in next ten years
 cost: assumes current year cost of approximately \$6,000 per species and further assumes no new candidate species

1.60M/yr

- goal: list one-fourth of current backlog of 2711 category 2 candidate species in next ten years
 cost: assumes same cost per newly listed species as prevailed in 1984

3.85M/yr

TOTAL ANNUAL LISTING NEEDS OVER NEXT DECADE IN CURRENT DOLLARS

11.2M/yr

RECOVERY

- goal: to prepare in the next ten years initial recovery plans for all newly listed species and currently listed U.S. species without plans
 cost: assumes same cost per initial recovery plan (\$3,000) as prevailed in 1984

5.50M/yr

- goal: to revise all recovery plans quinquennially
 cost: assumes current average plan revision cost of \$2,000 per revision

4M/yr

- goal: to continue or begin implementation of existing recovery plans and to begin implementation of all new plans
- cost: lower figure assumes same relationship of recovery plan implementation costs to number of listed U.S. species as currently prevails; higher figure represents accelerated implementation to accomplish recovery objectives

6.2M-12.4M in FY86
 8.4M-16.8M in FY87
 10.5M-21.0M in FY88

TOTAL ANNUAL RECOVERY NEEDS IN CONSTANT DOLLARS

15.7M-21.9M in FY86
 17.9M-26.3M in FY87
 20.0M-30.5M in FY88

STATE GRANTS

- goal: to return to 1977 levels of federal funding per cooperative agreement, adjusted for ensuing inflation
- cost: assumes no new state cooperative agreements and makes no upward adjustment for newly listed species

25.7M/yr

CONSULTATION:

- goal: to be able to respond to all consultation requests for all species over next ten years
- cost: assumes same relationship of total consultation costs to number of species listed as prevails currently

3.9M in FY86
 5.3M in FY87
 6.6M in FY88

LAW ENFORCEMENT

- goal: to improve forensic abilities, better implement CITES permit requirements, and provide effective law enforcement capability for an expanding list of protected species
- cost: 8.3M/yr

RESEARCH AND DEVELOPMENT

- goal: to provide an effective research capability for an expanding list of protected species
- cost: 5.2M/yr

- goal:** to continue or begin implementation of existing recovery plans and to begin implementation of all new plans
- cost:** lower figure assumes same relationship of recovery plan implementation costs to number of listed U.S. species as currently prevails; higher figure represents accelerated implementation to accomplish recovery objectives

6.2M-12.4M in FY86
 8.4M-16.8M in FY87
 10.5M-21.0M in FY88

TOTAL ANNUAL RECOVERY NEEDS IN CONSTANT DOLLARS

15.7M-21.9M in FY86
 17.9M-26.3M in FY87
 20.0M-30.5M in FY88

STATE GRANTS

- goal:** to return to 1977 levels of federal funding per cooperative agreement, adjusted for ensuing inflation
- cost:** assumes no new state cooperative agreements and makes no upward adjustment for newly listed species

25.7M/yr

CONSULTATION:

- goal:** to be able to respond to all consultation requests for all species over next ten years
- cost:** assumes same relationship of total consultation costs to number of species listed as prevails currently

3.9M in FY86
 5.3M in FY87
 6.6M in FY88

LAW ENFORCEMENT

- goal:** to improve forensic abilities, better implement CITES permit requirements, and provide effective law enforcement capability for an expanding list of protected species
- cost:**

8.3M/yr

RESEARCH AND DEVELOPMENT

- goal:** to provide an effective research capability for an expanding list of protected species
- cost:**

5.2M/yr

WESTERN HEMISPHERE

goal: to take advantage of international conservation opportunities identified as a result of 1982 directive to begin implementation of Western Hemisphere Convention

cost: 0.4M/yr

ENDANGERED SPECIES COMMITTEE

goal: to insure no diminishment in constant dollar terms of resources necessary to consider exemption requests

cost: 0.8M/yr

NMFS PROGRAM

goal: restore research programs for bowhead whales, Hawaiian monk seals, and sea turtles; begin systematic inventory of potential candidates for listing among marine species

cost: 7.0M/yr

AGRICULTURE PROGRAM:

goal: to provide effective trade enforcement capability for a substantially expanded list of plant species

cost: 3.0M/yr

TOTAL PROGRAM NEEDS FOR FY86	81.16M - 87.36M
FY87	84.76M - 93.16M
FY88	88.16M - 98.66M

Recapitulation by agency for FY86:

Fish and Wildlife Service	
listing	11.2M
law enforcement	8.3M
consultation	3.9M
recovery	15.7M-21.9M
R & D	5.2M
state cooperation	25.7M
Endangered Species Committee	0.8M
Dept. of Interior (Western Hemisphere)	0.4M
National Marine Fisheries Service	7.0M
Dept. of Agriculture	3.0M

Mr. BREAUX. The next witness will be Dr. Michael Zagata, manager, engineering ecological sciences, Tenneco, Inc.

STATEMENT OF MICHAEL ZAGATA

Mr. ZAGATA. Mr. Chairman, I am Michael Zagata, Manager of Ecological Sciences for Tenneco, Inc., and I am here today on behalf of the American Petroleum Institute to support the reauthorization of the Endangered Species Act.

The objectives of the petroleum industry are in harmony with regard to the need to identify and protect those species that, for one reason or another, face man-induced extinction. However, in accomplishing those objectives, we must provide for a process that allows for certainty, timeliness, and the ability to undertake long-range project planning so we can train our people and contractors.

Indeed, when the Endangered Species Act affects our operations, we would like to work creatively with governmental agencies in an approach to resolve those problems. Such cooperation should be encouraged because it will lead to practical approaches that may not only protect but enhance the status of the species.

In keeping with this overall objective, I would like to bring to your attention some of the industry's concerns with regard to the Endangered Species Act. There are administrative changes that could be made which would enhance the likelihood of recovery for listed species and lessen the economic burden that we face.

RECOVERY TEAMS AND PLANS

The first of these involves recovery teams and plans. We know that the intent of the act is not merely to list species, but to provide for positive programs to aid their recovery. Those programs were to be developed and carried out by recovery teams. The record to date is rather dismal. We continue to list species and yet there are only 164 approved plans in place for 224 listed species for the United States. Of these, few have actually been carried out. It seems logical to expect that when a species is listed, resources are made available to increase the likelihood that it will recover and be delisted. There should be a commitment to develop and implement a recovery plan within a reasonable length of time after listing. The public should have an opportunity to participate in the development of such a plan.

CUMULATIVE IMPACT

Another difficulty is that of cumulative impacts. There is a potential problem for projects that require a long period of time from their inception through their implementation. How many projects should be given a no-jeopardy opinion and how much of a buffer zone or cushion should we allow for a given species in a given area? If a full-time recovery team were in place, a report could be issued on the status of the species in question at regular intervals. Such a report would serve as an early warning device so that the cumulative impact of various projects could be assessed accurately. This report could be tied to the 5-year review process that already exists under the act.

ADEQUACY OF DATA AND RESPONSIBILITY FOR GENERATING THAT DATA

The act requires that biological opinions be based on available information. If the information is available, it should be used. If there is no information, it should be generated. If a species is listed, there must be a concurrent commitment to generate the data necessary to evaluate permit applications and to implement a program for the species recovery. In addition, it should be insured that surveys and studies which contain additional data can be implemented within the time frame of a mutually agreed upon extension period.

SCIENTIFIC REVIEW PROCESS

When faced with listing or jeopardy decisions, there are instances when scientists disagree on the conclusions drawn from available data. There needs to be an opportunity to consult with credible scientists who are not directly involved in the process who will recommend an appropriate course of action based on the data. This scientific review ideally should occur before the exemption process in the case of a jeopardy opinion. However, it should not preclude an applicant from pursuing an exemption if, knowing that the interpretation of the data for a jeopardy opinion has been upheld, the applicant still desires to pursue a permit.

A precedent for this procedure was set with the Illinois mud turtle. The Fish and Wildlife Service took a commendable step and went to the National Academy of Sciences for assistance. The academy developed a list of experts and the Fish and Wildlife selected a team from that list. The team analyzed the available data and made a recommendation which the Service followed.

This process served two valuable functions: It provided for a resolution of the problem that all parties could agree to; and it alerted all the scientists acting on behalf of the parties involved that their work would be subjected to peer review by highly qualified, outside experts.

EARLY CONSULTATIONS

The act currently states that agency may engage in early consultation with applicants. As Mr. Breaux said in the September 3, 1982, Congressional Record, preproject consultation "will allow private parties to modify or alter their project plans at an earlier, more flexible point in the design phase of the project."

The regulatory agencies have also made strong requests for this kind of process. Yet we find, at the field level, that action agencies have denied such requests for early consultation. We urge you to encourage the action agencies to engage in preproject consultations when requested to do so by a citizen contemplating an activity requiring a permit that would trigger the administration of the Act.

BIOLOGICAL OPINIONS

It is in the interest of the species to have the best data available used in the determination of jeopardy or no jeopardy opinions and in the formulation of reasonable and prudent alternatives under section 7. Such data may rest with the applicant, the regulatory

agency, or both. At present, the applicant is excluded from the decision process leading to a jeopardy or no jeopardy opinion. We believe it is desirable to allow the applicant, upon his request, to participate in this process.

MITIGATION BANKING

The section 7 jeopardy opinion process contains language calling for reasonable and prudent alternatives, and the incidental taking portion of section 7 mentions reasonable and prudent measures. Both are approaches to mitigating adverse impacts. Within the range of reasonable and prudent measures, or alternatives, we suggest that the committee consider the concept of mitigation banking as one of the available alternatives under the act.

Mr. Chairman and members of the committee, let me once again say that the petroleum industry supports the goals of the Endangered Species Act. We have appreciated this opportunity to express our concerns. We ask that this statement and the other statements that we will submit later be entered in full in the record. If you have any questions, I will be happy to answer them either now or provide written answers.

[The prepared statement of Michael Zagata follows:]

PREPARED STATEMENT OF MICHAEL ZAGATA, MANAGER, ECOLOGICAL SCIENCES, TENNECO, INC., ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE

Mr. Chairman, members of this Subcommittee, I am Dr. Michael Zagata, Manager of Ecological Sciences for Tenneco Inc. I am here today on behalf of the American Petroleum Institute to support the reauthorization of the Endangered Species Act. We support your statement in the February 7, 1985, Congressional Record and look forward to working with you to assure an "approach to reauthorization with commitment to a rational process where we can concentrate on the facts and resolve conflicts with patience and compromise." Indeed, the "conflicts" are associated with the administration of the Act rather than the goals of the Act.

The objectives of the petroleum industry are in harmony with those of the conservation community with regard to the need to identify and protect those species that, for one reason or another, face man-induced extinction. However, in accomplishing those objectives we must provide for a process that allows for certainty, timeliness, the ability to undertake long-range project planning, and the opportunity to train our people and contractors.

At the outset, we would also like to point out an erroneous assumption about oil and gas operations and their impacts on the environment. Frequently, it is assumed that industry's exploration and production activities always adversely affect species. Such activities often constitute only minimal disturbances in a given area and do not jeopardize an endangered species. Indeed, when the Endangered Species Act affects our operations we would like to work creatively with governmental agencies in our approach to problems. Such cooperation should be encouraged because it will lead to practical approaches that may not only protect, but also enhance the status of species. Ideally, we should be able to develop and test our hypotheses about techniques that allow operations to continue in such a manner that they are compatible with the environment.

In keeping with this overall objective, I would like to bring to your attention some of the petroleum industry's concerns with the Endangered Species Act. There are administrative changes that could be made which would enhance the likelihood of recovery for listed species and lessen the economic burden we face. API plans to provide this Subcommittee with additional information in the form of a supplemental statement for the record which will address the issues of incidental taking and experimental populations.

RECOVERY TEAMS AND PLANS

As we know, the intent of the ESA is not merely to list species, but to provide for positive programs to aid their recovery. Those programs were to be developed and

carried out by recovery teams. The record to date is rather dismal. We continue to list species and yet there are only 164 approved recovery plans in place for 224 listed animal species for the United States. Of these, few plans have been carried out. It seems logical to expect that when a species is listed, resources are made available to increase the likelihood that it will recover and be delisted. A greater effort must be made to execute meaningful management programs that will lead to the recovery of the species. In addition, there should be a commitment to develop a recovery plan within a reasonable length of time. The public should have an opportunity to participate in the development of a recovery plan.

CUMULATIVE IMPACT

Another difficulty is cumulative impacts. There is a potential problem for projects that require a long period of time from their inception through their implementation. How many projects should be given a no-jeopardy opinion and how much of a buffer zone should we allow for a given species in a given area? If a full-time recovery team were in place, a report could be issued on the status of a species at regular intervals. Such a report would serve as an early warning device, so that the cumulative impact of various projects could be assessed accurately. This report could be tied to the five-year review process that already exists under the ESA.

ADEQUACY OF DATA AND RESPONSIBILITY FOR GENERATING DATA

The ESA requires that biological opinions be based on "available" information. If the information is available, it should be used. If there is no information, it should be generated. If a species is listed, there must be a concurrent commitment to generate the data necessary to evaluate permit applications and to implement a program for the species recovery. In addition, it should be ensured that surveys or studies which contain additional data can be completed within the scope of the mutually agreed extension period.

SCIENTIFIC REVIEW PROCESS

When faced with listing or jeopardy decisions, there are instances when scientists disagree on the conclusions drawn from available data. In the past, API has supported the concept of a scientific review process which, in the case of the ESA, may serve as a useful way to resolve this kind of problem.

There needs to be an opportunity to consult with credible scientists who are not directly involved in the process and who will recommend an appropriate course of action. This scientific review should ideally occur before the exemption process in the case of a jeopardy opinion. However, it should not preclude an applicant from pursuing an exemption if, knowing that the interpretation of the data for a jeopardy opinion has been upheld, the applicant still desires to pursue a permit.

A precedent for this procedure was set with the Illinois mud turtle. The Fish and Wildlife Service (FWS) interpreted its data to indicate a jeopardy situation, while a consulting team of scientists acting on behalf of a developer generated data that were interpreted otherwise. A classic confrontation was developing. The FWS took a commendable step and went to the National Academy of Sciences for assistance. The Academy is not geared to producing short-term analysis, but it is geared to identifying credible scientists. It developed a list of experts and FWS selected a team from that list. The team analyzed the available data and made a recommendation which the FWS followed.

This process served two functions: (1) it provided for a resolution of the problem; and (2) it alerted all the scientists, acting on behalf of the parties involved, that their work would be subject to peer review by highly qualified outside experts.

EARLY CONSULTATIONS

The ESA currently states that agencies may engage in early consultation with applicants. As Mr. Breaux said in the September 3, 1982, Congressional Record, pre-project consultation "will allow private parties to modify or alter their project plans at an earlier, more flexible point in the design phase of the project."

As shown by the legislative history of the 1982 amendments of the ESA, the Committee has supported the idea of pre-project consultation. Pre-project consultations identify potential problems early in the planning process and reduce conflict. The regulatory agencies have also made strong requests for this kind of process.

Yet we find, at the field level, that action agencies have denied such requests. We urge you to encourage the action agencies to engage in pre-project consultations

when requested to do so by a citizen contemplating an activity which would trigger the administration of the ESA.

BIOLOGICAL OPINIONS

It is in the interest of the species to have the best data available used in the determination of jeopardy or no-jeopardy opinions and in the formulation of reasonable and prudent alternatives under Section 7. Such data may rest with the applicant, the regulatory agency, or both. At present, the applicant is excluded from the decision process leading to a jeopardy or no-jeopardy opinion. We believe it is desirable to allow the applicant, upon request, to participate in this process.

MITIGATION BANKING

The Section 7 jeopardy opinion process contains language calling for reasonable and prudent alternatives, and the incidental taking portion of Section 7 mentions reasonable and prudent measures. Both are approaches to mitigating adverse impacts. Within the range of reasonable and prudent measures, we suggest that the committee consider the concept of mitigation banking as one available alternative under the ESA.

Mitigation banking, as we use the term, involves the recording of "habitat credits" for voluntary work that enhances or maintains the environment. This work, performed by companies or individuals, is accomplished in advance of a specific permit application. When a company or individual needs a permit that requires mitigation, the "credits" that have accumulated in the "bank" can be withdrawn.

Mr. Chairman, members of this Subcommittee, let me once again say that the petroleum industry supports the goals of the Endangered Species Act. I have appreciated the opportunity to discuss some suggestions for administrative change which would enhance the likelihood of recovery for endangered species and would, at the same time, lessen the economic burden we face.

I request that the full text of this testimony be entered into the record. API will also submit an additional statement for the hearing record which discusses several other issues related to the Endangered Species Act.

If you have any questions, I would be happy to either answer them now or obtain the answers for the record.

Mr. BREAU. Next we will hear from Mr. Marcoux.

STATEMENT OF RON MARCOUX

Mr. MARCOUX. Thank you, Mr. Chairman.

My name is Ron Marcoux, associate director of the Montana Department of Fish, Wildlife and Parks, and a member of the Endangered Wildlife Committee for the International Association of Fish and Wildlife Agencies.

With me this morning is Paul Lenzini, counsel for the International Association of Fish and Wildlife Agencies.

I propose to summarize my written testimony, Mr. Chairman. I request that my full testimony be included in the record.

It is as a representative of both the State of Montana and the International that I am here today to voice their strong support for the extension of the Endangered Species Act, with authorized funding of at least \$6 million for each of the additional 3 years provided for section 6 under H.R. 1027.

Continuation of that program is vitally important both to my own agency and to association members throughout this country, Canada, and Mexico, because of our shared commitment to resource conservation and management of those species for which it provides.

Today I would like to briefly review some concerns that we have in the recent court actions in interpreting the Endangered Species Act, and I will offer some suggestions for improvement relating to these recent decisions.

Before I do that, I would like to focus on Montana and focus in particular on the grizzly bear, because this will be the species that will be of immediate concern because we already have received written notice that there is a potential intent to file a lawsuit on our grizzly bear hunting season in Montana.

Montana has three grizzly ecosystems, the Yellowstone, which I believe everybody hears about, the northern Continental Divide, which starts with Glacier Park and includes the Rocky Mountain front area, and the Cabinet Yaak Ecosystem.

For many years, we have been deeply involved in management of wildlife, and in particular, the wildlife of the Northern Continental Divide Ecosystem. That particular ecosystem currently has the highest density of grizzly bears in the lower conterminous 48 States.

The history goes back to 1913, when we started with a game range, a game preserve being developed and protected by the Montana Legislature. Part of the area then became the Bob Marshall Wilderness Complex, and today we know it as the Rocky Mountain Front, and also the Northern Continental Divide Grizzly Bear Ecosystem.

Through sportsmen's dollars we have purchased additional lands, additional game ranges, three of which are very significant for grizzly bears. The Nature Conservancy has also come into Montana and purchased additional lands in this area, one purchase is a very important and critical grizzly bear habitat.

The net effect of all this effort in Montana has been the restoration of one of the biggest game herds in North America.

Today in this ecosystem we have several thousand head of elk, many thousands of head of mule deer, one of the biggest bighorn sheep populations in the United States. We have been managing those species with the use of hunting. We have also been managing the grizzly bear likewise. Going back as far as 1941, we managed seasons, we curtailed spring hunting to help protect the grizzly and to provide for its future existence. At one time they were considered vermin in that country, and were targeted for elimination. A situation that existed in most of Western America.

But today we still have viable populations, and we believe our management program is working.

This brings me to the second part of what I would like to bring out, and this is our concern with the provisions of the Endangered Species Act. As originally passed, the act was effectively focused upon preventing habitat losses. Currently, it is losing that focus, and our State program must accommodate a hard rock mine, an oil and gas exploration well, and a ski resort all in critical grizzly bear habitat. At the same time, we are finding that imprecise language in other sections of the law leave our State management efforts vulnerable to lawsuits that not only drain our time and resources but threaten to undermine our grizzly bear preservation strategy.

I would like to draw the subcommittee's attention to the recent ruling of the eighth circuit in *Sierra Club v. William Clark*. In a split decision, the court restricted the discretionary authority of the Secretary of the Interior and, in turn, the States, with respect to regulated taking of threatened species. The case involved public trapping of the grey wolf in specified areas of Minnesota, a pro-

gram recommended by the Eastern Timber Wolf Recovery Team and authorized by the Secretary to control wolf depredations. Focusing on an ambiguity in language of the act, the eighth circuit set aside the program, ruling that the Secretary may not authorize taking of a threatened species in the absence of a determination that population pressures within the ecosystem cannot be otherwise relieved.

We feel that the ruling poses an immediate threat to the conservation of the grey wolf and also can affect the conservation efforts of the grizzly bear in Montana.

I would like to state that we in the Montana Department of Fish, Wildlife and Parks are committed to the preservation of the grizzly bear for the benefit of all Americans.

I would like to relate that we live with the grizzly bear, we live with the people that associate with the grizzly bear on a daily basis. We don't have the luxury of just having an opinion about the bear. We are in a situation where we have to make judgments on the management of the bear.

In this spirit we are firmly of the view that a critical feature of any conservation program for the grizzly in Montana is that human conflict to be minimized. And that limited taking may be the best way to achieve the long-range goal of species preservation.

We are requesting the subcommittee to review amending the act so that we can continue to work to bring threatened species to the point where they no longer require protection under the act.

With regard to section 6, the law currently provides for funding to States. In the past 2 years our first priority has been for grizzly bear projects. These projects have failed to gain approval in either year despite the importance given recovery of the bear. Moreover, states cannot provide needed program continuity unless there is assurance of funding stability under our section 6 program. This has been a problem for States since the inception of the act.

Mr. Chairman, while alluding to concerns we have with the act, let me stress the very positive role of the International and its members in the initial passage and the implementation of that legislation, and its most recent authorization. Many States have their own Endangered Species Act and many have their own agreements with the Fish and Wildlife Service and most are involved in endangered species programs. More than 30 States, including Montana, have nongame checkoff legislation showing further interest in the nonhunted species. We do not intend that our concern with the current problem and court action should overshadow our support for and overall satisfaction with the act and its objectives.

I appreciate having the opportunity to come before you today, and I would be willing to address any questions you may have.

[The prepared statement of Ron Marcoux follows:]

PREPARED STATEMENT OF RON MARCOUX ON BEHALF OF THE STATE OF MONTANA AND INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES

Mr. Chairman, I am Ron Marcoux, Associate Director of the Montana Department of Fish, Wildlife and Parks, and a member of the Endangered Species Committee of the International Association of Fish and Wildlife Agencies.

It is as a representative of both the State of Montana and the IAFWA that I am here today to voice their strong support for the extension of the Endangered Species

Act, with authorized funding of at least \$6 million for each of the additional three years provided for Section 6 under H.R. 1027.

Continuation of that program is vitally important both to my own agency and to Association members throughout this country, Canada, and Mexico, because of our shared commitment to resource conservation and management of those species for which it provides.

At the same time I would suggest the need for some changes in language of the Act and in the method of its administration to increase its effectiveness.

My testimony today will address the following points: First, that Montana is dedicated to the preservation of fish and wildlife. This dedication is rooted deeply in the history of our state and our people; second, that the Endangered Species Act has developed the potential for frustrating our efforts to preserve some species; and third, I will offer suggested areas of improvement.

While our suggestions are directed at the Endangered Species Act in general, we wish to focus on the grizzly bear as it, along with the grey wolf, illustrates a major concern.

Since this testimony is critical of some of the aspects of the Act, it is relevant to establish Montana's conservation credentials and resolve, as well as those of the Association. In 1913, the Montana State Legislature created the Sun River Game Preserve, an action that began the restoration of big game in what would in time become the Bob Marshall ecosystem and the Northern Continental Divide grizzly bear ecosystem.

In addition to aggressive participation in public lands issues, the state, using funds collected from sportsmen, has acquired four game ranges adjacent to this wild land complex. Two of these ranges are extensively used by grizzly bear and one, the Blackleaf, is absolutely critical habitat. A fifth area also critical to grizzly bear was acquired by the Nature Conservancy. The net effect of it all is the restoration of one of the most significant big game habitats in the country.

Today, in just part of this ecosystem we winter 3,000 elk where at the turn of the century there were less than 300. We provide for more than 15,000 mule deer and one of the largest bighorn sheep herds in the country. The list includes the grizzly bear among the direct beneficiaries. These species and others have been, and continue to be, hunted. It is an important part of a program that is working, and has been since the turn of the century.

This brings us to the second point of this testimony; our concern with some provisions of the Endangered Species Act. As originally passed, the act was effectively focused on preventing habitat losses. Currently it is losing that focus and in our state the program now must accommodate a hard rock mine, an oil/gas exploration well and a ski resort—all in critical Montana grizzly bear habitat. At the same time, demanding or imprecise language in other sections of the law leave our state management efforts vulnerable to lawsuits that not only drain our time and resources, but threaten to undermine our grizzly bear preservation strategy.

As an example, we draw the subcommittee's attention to the recent ruling of the US Court of Appeals for the Eighth Circuit in *Sierra Club et al. v. William Clark, et al.* No. 84-5042-MN. In a split decision the court restricted the discretionary authority of the Secretary of the Interior and in turn, the states, with respect to regulated taking of threatened species. The case involved public trapping of the grey wolf in specified areas of Minnesota, a program recommended by the Eastern Timber Wolf Recovery Team and authorized by the Secretary to control wolf depredations. Focusing on an ambiguity in language of the Act, the Eighth Circuit set aside the program, ruling that the Secretary may not authorize taking of a threatened species in the absence of a determination that population pressures within the ecosystem cannot be otherwise relieved.

Prior to this ruling, it was generally understood that the Secretary could authorize the taking of endangered species in the extraordinary case and could authorize taking of threatened species in a variety of circumstances. Indeed, the 1973 House Report stated "Once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with respect to the permitted activities for those species". H. Rep. No. 93-412, 12. According to the court, however, the Secretary can never authorize taking of an endangered species as part of a conservation program and may authorize taking of a threatened species only in the extraordinary case to relieve population pressures. The court ruling virtually does away with the distinction between the protections afforded endangered and threatened species.

The ruling poses an immediate threat to conservation of the grey wolf with estimates that it could result in the continued illegal taking of as many as 200 animals

a year, if allowed to stand, and could also affect conservation of the grizzly bear in Montana.

We in the Montana Department of Fish, Wildlife and Parks are committed to preservation of the grizzly bear for the benefit of all Americans.

The grizzly is our state animal and, as with other resident species of wildlife, we operate under a statutory mandate to manage and protect the species. We are required not just to hold opinions about grizzly management, but to make judgments. In this spirit, we are firmly of the view that a critical feature of any conservation program for the grizzly in Montana, and in our opinion, for the wolf in Minnesota, is that human conflict be minimized. To that end, limited taking may be the best way to achieve the long-range goal of species preservation.

The Eighth Circuit ruling threatens conservation programs, both for the grizzly in Montana and the wolf in Minnesota, which involve closely regulated taking of a threatened species, and which are practical and effective strategies for preservation of the species. We have been hunting grizzly bear in the Northern Continental Divide ecosystem of Montana since statehood and it is the only grizzly population in the lower 48 states that is still prospering.

To ensure that Montana's program not be undermined in the way that Minnesota's has been, we urge that the statute be amended to confirm, and in the Eighth Circuit to restore, the Secretary's discretion to authorize measures designed to bring threatened species to the point where they no longer require the protections of the Act.

The law presently calls for "consultation" with the states. Considering the commitment we are making to preserve these species, we ask a partnership in managing resident species that we view as our primary responsibility. Simply noting our concerns can satisfy the consultation language, but we are left without substantive influence in actions originating from this act, while bearing their consequences.

Finally, Section 6 of the law provides for funding to the States. It is our experience that state priorities are given little emphasis in this process. Our number one priority the last two years has been grizzly bear projects. These projects have failed to gain approval in either year despite the importance given recovery of the bear. Moreover, states cannot provide needed program continuity unless there is assurance of funding stability under section 6. This has been a problem since inception of the Act.

In conclusion, although we offer some concerns and suggest some amendment, our department is supportive of the Endangered Species Act. We seek only to improve it so we can achieve its noble goals. Our department is also resolute in its determination to conserve and preserve this nation's wildlife heritage. It is a mission we intend to accomplish under any circumstances. An improved Endangered Species Act can be of substantive assistance.

Mr. BREAUX. Thank you for your presentation.

We will next hear the testimony of Mr. Tom Pitts.

STATEMENT OF TOM PITTS

Mr. PITTS. Thank you, Mr. Chairman.

My name is Tom Pitts. I am a professional engineer, and I am here today in my capacity as manager of the Colorado Water Congress Special Project on Threatened and Endangered Species.

In that capacity, since December 1983, I have been managing a team of engineers, scientists, biologists, and attorneys in an effort to resolve potential conflicts between the implementation of the Endangered Species Act and water laws as they exist in the Western United States.

My co-witness today is Gregory Hobbs. Gregory is an attorney with the law firm of Davis, Graham & Stubbs in Denver. He has had extensive experience in environmental law and regulation and he is a member of the management committee of the Colorado Water Congress Special Project.

The Colorado Water Congress is an organization with about 500 members which is made up of agricultural, municipal, and industrial water interests in the State, and it is roughly divided equally

among those sectors. For the last 15½ months we have been working diligently with our counterparts in Federal agencies, State governments, and water users and interests in Utah, Nebraska, and Wyoming to resolve these potential conflicts.

In 1983 the Fish and Wildlife Service proposed administrative procedures for implementing the Endangered Species Act which would nullify longstanding interstate compacts that have been ratified by Congress, would abrogate the State water rights systems which apportion water within the States, and would override equitable apportionment decrees of the U.S. Supreme Court. There is no question in the minds of those who are knowledgeable of those matters that this would have any effect and it would have been followed by related widespread adverse social, economic, and environmental impacts on the Western United States.

For the last year we have been working with the Fish and Wildlife Service and the Bureau of Reclamation in the States of Colorado, Wyoming, and Utah to develop an approach that will conserve the endangered species and avoid the kind of conflicts with Western water law and its implementation. This process was referenced by Mr. Jantzen in his testimony earlier.

We believe that scientifically supportable solutions are available which will meet these criteria.

In the Upper Colorado River Basin, the Colorado Water Congress supports immediate implementation of an effective scientifically supportable program to fully recover endangered fish species, applying all reasonable and prudent alternatives for management measures. These could include, in the Upper Colorado Basin, the hatching, rearing, and stocking of fish, more active management of endangered fish populations, and continued research and monitoring of endangered fish populations.

Administrative procedures which nullify interstate water compacts ratified by the Congress or the U.S. Supreme Court decrees are not reasonable and prudent, nor are such measures necessary to conserve endangered species.

We believe that workable solutions are available in the Platte River Basin as well. That basin encompasses large portions of Colorado, Wyoming, and Nebraska. Two days ago we met with the Federal agencies and State governments, water organizations, and representatives of environmental organizations to begin the process of developing workable solutions to endangered species problems which are not in conflict with water compacts and State water laws. The statement of purpose adopted by the coordinating committee said specifically that our goal is to develop ways to conserve endangered species while effectively maintaining and respecting State water laws and interstate compacts. The Colorado Water Congress is committed to working with the Federal agencies, the States, and all interested parties, including environmental organizations, in developing solutions which meet those goals. We believe that the Secretary of the Interior has the discretion under the existing Endangered Species Act to implement solutions which would meet both of those goals and accommodate both goals.

As I mentioned, we have been working in the Colorado Basin for about a year trying to arrive at a solution. We think that a solution will come within the next 6 to 8 months.

In the Platte Basin, we just really began the process, and we anticipate that in about a year or so we will arrive at a solution which meets the requirements of section 2(c)(2) of the Endangered Species Act which states:

It is further declared to be the policy of Congress that the federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with the conservation of endangered species.

That is our goal. We will know within a year whether or not we can achieve this goal within the existing Endangered Species Act. Because of that, we are requesting a 1-year reauthorization of the Endangered Species Act. If we find that amendments are needed to achieve the goals stated in section 2(c)(2), we will be able to tell you exactly and precisely why those amendments are necessary at that time and what specific amendments are needed. If those amendments are needed, we would hope to have the consensus of all the parties involved in this process on the need for those amendments.

I would like to enter into the record a resolution passed by the Colorado House and the Colorado State Senate which, I believe, supports the goals expressed today for resolving these problems.

[The information follows:]

RESOLUTION PASSED BY COLORADO HOUSE AND SENATE

(Resolution urging that the Government of the United States resolve questions regarding endangered species in the Platte River Basin and the Colorado River Basin in a manner which fully respects interstate compacts, equitable apportionment decrees, and the water rights systems of the respective States)

Whereas, In 1982, the Fifty-third General Assembly of the state of Colorado adopted Senate Joint Memorial No. 1, urging that the Government of the United States refrain from interfering with state water allocation systems, water rights, and compact entitlements through misuse of the federal Endangered Species Act; and

Whereas, The Secretary of the Interior has established state-federal work groups for the Colorado River and Platte River basins in order to determine how to meet the terms of the Endangered Species Act while fully maintaining the compact entitlements, equitable apportionment decrees, and water rights systems of the affected states of Colorado, Wyoming, Utah, and Nebraska; and

Whereas, Nonflow alternatives for management of endangered or threatened fish and wildlife may alleviate conflict between state water administration and preservation of endangered fish and wildlife in the Colorado and Platte River basins; and

Whereas, Nonflow alternatives should be the first priority for management; and

Whereas, Preservation of endangered species is a national goal and should be nationally funded; and

Whereas, Use of regulatory mechanisms, such as section 404 dredge and fill permits, to require the uncompensated surrender of all or part of a water right as the price for pursuing exercise of that right, is repugnant to the laws of Colorado; and

Whereas, There is a legitimate question as to whether the designated whooping crane habitat on the Platte River in central Nebraska is a truly critical habitat for that species; now, therefore,

Be It Resolved by the Senate of the Fifty-fifth General Assembly of the State of Colorado, the House of Representatives concurring herein:

(1) That the exercise of water rights under state water law systems should proceed in the Colorado River and Platte River basins, in accordance with applicable interstate compacts, equitable apportionment decrees, and the water laws of the affected states; and

(2) That the Department of Interior, in administering the Endangered Species Act, should put a first priority on the use of nonflow management alternatives for preservation of endangered or threatened species; and

(3) That where water is required for preservation of endangered or threatened species, based upon sound scientific analysis, such water should be purchased or obtained by the federal government under section 5 of the Endangered Species Act, not through use of section 7 of the Act; and

(4) That the Platte River and Colorado River basins state-federal work groups should proceed expeditiously to spell out a process or plan which will meet the terms of the Endangered Species Act while fully maintaining the compact entitlements, equitable apportionment entitlements, and water rights in the affected states of Colorado, Wyoming, Utah, and Nebraska; and

(5) That the Department of the Interior should implement a temporary moratorium on additional listings of endangered or threatened species which may adversely impact state water administration pending completion of the process described in subsection (4); and

(6) That the designated critical habitat of the whooping crane in central Nebraska on the Platte River should be examined for delisting, and it should be delisted if it is not absolutely necessary for the survival of the whooping crane; and

(7) That the Endangered Species Act should be amended to require the Fish and Wildlife Service and other federal agencies to place first priority on nonflow management alternatives, when conflicts with state water allocation systems and water rights are otherwise a potential; and such other amendments to the Endangered Species Act should be made as are necessary to preserve to the states their management systems.

Be It Further Resolved, That copies of this Memorial be sent to each member of the Congress from Colorado, to the Senate and House Committees of Reference which must examine reauthorization of the Endangered Species Act, to the Governors and Legislatures of Wyoming, Nebraska, and Utah, to the Secretary of the Interior, the Secretary of the Army, and the Secretary of Agriculture.

TED L. STRICKLAND,
President of the Senate.

MARJORIE L. NIELSON,
Secretary of the Senate.

CARL B. BLEDSOE,
Speaker, House of Representatives.

LORRAINE F. LOMBARDI,
Chief Clerk, House of Representatives.

Mr. PITTS. I would also like to thank the committee, Mr. Chairman, and the members of the subcommittee for allowing us to testify today. Thank you, Mr. Chairman.

Mr. BREAU. Thank you, Mr. Pitts.

[The prepared statement of Tom Pitts follows:]

PREPARED STATEMENT OF TOM PITTS ON BEHALF OF THE COLORADO WATER CONGRESS

INTRODUCTION

Mr. Chairman, Members of this Subcommittee, I am Tom Pitts, Principal, Tom Pitts and Associates, Consulting Engineers, Loveland, Colorado. My co-witness is Gregory J. Hobbs, Jr., Attorney at Law, with the firm of Davis, Graham and Stubbs, Denver, Colorado. We are here today on behalf of the Colorado Water Congress, a statewide water users organization made up of agricultural, municipal, and industrial members. For the last fifteen and half months, the Colorado Water Congress, through its Special Project on Threatened and Endangered Species, has been working diligently towards resolution of conflicts between the administration of the Endangered Species Act and administration of water allocation and management systems of the states.

BACKGROUND

On December 2, 1983, the Colorado Water Congress Board of Directors authorized creation of the "Colorado Water Congress Special Project on Threatened and Endangered Species".

The Special Project was created in response to proposals by the U.S. Fish and Wildlife Service (FWS) to implement the Endangered Species Act in the Colorado River Basin and Platte River Basin in a manner which would abrogate State water rights systems and nullify water allocation under long-standing interstate water compacts and equitable apportionment decrees of the United States Supreme Court. Changes in water project operational requirements would have been required, including construction of expensive additional storage to meet minimum flow requirements during certain times of the year, as well as severe restrictions on the timing

and quantity of water diverted. Any existing or proposed water project needing any type of Federal permit or license would have been subject to minimum flow requirements.

COLORADO RIVER BASIN

In June, 1983, the U.S. Fish and Wildlife Service circulated a "draft conservation plan" for three endangered fish species in the Upper Colorado River Basin which would have (a) required maintenance of pre-1960 minimum flows, including a 17,000 cfs "flushing flow," (b) established a priority system based on consultation under the Federal Endangered Species Act rather than on State water rights allocation systems, and (c) nullified long-standing interstate water compacts.

Initial Special Project activities included interviewing FWS personnel to determine methods of implementing the plan, and the scientific basis, if any, for the minimum flow proposals. CWC engaged the services of Ecosystem Research Institute of Logan, Utah to compile an endangered species data base from existing State and Federal sources. CWC learned that FWS had no biological basis for the minimum flow recommendations, and that they were based on simply maintaining pre-1960 hydrologic conditions in the Upper Basin. In the process of requesting biological data from FWS and State wildlife organizations, CWC learned that the Federal government had not compiled and analyzed endangered species data, which had been collected over the last twenty years, prior to making its drastic proposals. CWC found that FWS had no data indicating that imposition of minimum flows in the Upper Basin would guarantee survivability of the endangered species. Other significant factors affecting endangered species, including predation by game species, were ignored. FWS subsequently withdrew its "draft conservation plan" and initiated a new process to develop a plan for managing endangered species in the Upper Colorado Basin.

Subsequently the Department of the Interior established a joint working group comprised of representatives of Wyoming, Utah, Colorado, the Fish and Wildlife Service, and the Bureau of Reclamation. The goal of the group is to recommend an administrative solution to endangered species problems which assures the conservation of endangered species and fully respects state water rights systems, interstate water compacts, and equitable apportionment decrees. The Water Congress and environmental organizations are also participating in this effort.

The Colorado Water Congress supports an administrative solution which emphasizes as the first priority management alternatives which are consistent with individual state water allocation systems. Hatchery and stocking programs for endangered fishes is one such means. A recovery plan should be established which recognizes full development of the water entitlements of the various Colorado River basin states and allows water projects to proceed without receiving jeopardy opinions.

PLATTE RIVER BASIN

In January, 1983, FWS rendered a jeopardy opinion under the Endangered Species Act on the Narrows Project in northeastern Colorado. This opinion, which could equally apply to all water projects in the Platte River Basin in Colorado, Wyoming, and Nebraska, stated that adverse modification of the whooping crane habitat could be alleviated if the Narrows Project proponents (U.S. Bureau of Reclamation) would deliver 32,000 acre-feet of water more than 100 miles downstream at Overton, Nebraska. Assuming that would even be feasible, and it may not be if carriage losses are considered, approximately one-half of the yield of the Narrows Project might have had to be released to try to meet this requirement.

In October, 1983, the Fish and Wildlife Service published a proposed plan for maintaining flow requirements in the Platte River in central Nebraska. The plan included maintenance of 3800 cubic-feet-per-second for twenty-three days, as well as 1100 cfs flows during the spring and fall at a minimum. Such flows would prevent development of the water entitlements of Wyoming, Colorado and Nebraska.

In late 1983, the Bureau of Reclamation (USBR) and FWS organized a Federal/State working group to review the situation and develop a work plan for the Platte. As of September, 1984, this work plan had been under discussion for approximately a year without Federal/State agreement on the approach to be taken.

In the meantime, water users in Colorado, Wyoming, and Nebraska formed an Interstate Task Force on Endangered species and asked the Secretary of the Interior to establish a working group process similar to the effort on the Colorado River.

The Secretary of the Interior responded favorably. The first meeting of the reconstituted Federal/State Coordinating Committee on the Platte River Basin was scheduled for March 12, 1985. The Colorado Water Congress looks forward to active

participation, along with other interested parties, with the goal being a constructive solution that assures conservation of endangered species while fully maintaining the water allocation and management systems of the states.

RESOLUTION OF ENDANGERED SPECIES/WATER ISSUES

Experience in working towards solutions in the Colorado and Platte basins, with the objective being equal respect for the water laws of the States and the Endangered Species Act, is showing that conflict can be minimized or eliminated by careful choice of management alternatives, such as fish stocking, in the Colorado River Basin, and mechanical brush and tree clearing in the Platte River Basin.

Given existing interstate compact water delivery requirements and reregulation of the Colorado and the Platte Rivers by reservoir releases and return flows from upstream uses, the habitat of the Colorado River fishes and the whooping crane will always have water. It may be, in the Platte River Basin, that a carefully placed reservoir, off channel, just above the whooping crane habitat, is the best and most reliable means to supply flows that may be needed through the crane habitat. These and other possibilities need to be examined in the working group.

The Fish and Wildlife Service, when dealing with potential conflict between the Endangered Species Act and the water laws, compact entitlements, and equitable apportionment decrees of the states, should start from the premise that both will be fully maintained. If this premise is the starting point, we are convinced that solutions can be found.

The Colorado Water Congress is seeking an appropriate, effective, scientifically supportable, administrative solution. We believe that such a solution is achievable under the current Endangered Species Act. Such a solution would:

1. Recognize that artificial propagation and stocking are often necessary for conservation of endangered species.
2. Emphasize the use of management alternatives for recovery of endangered species which are not in conflict with state water rights administration systems or interstate water compacts.
3. Recognize that the goals and terms of the Endangered Species Act can be accomplished in a way that fully maintains state water allocation systems and the interstate water compacts.

We believe that the Secretary of the Interior has the discretion in the existing Endangered Species Act to implement these approaches to endangered species recovery. We are working in an administrative process to find out if these solutions can truly be implemented in this way. In the event we find, or the Secretary of the Interior finds, that implementation of reasonable approaches to Endangered Species Act cannot be implemented, we will want to come back at the end of the process which is now going forward in the Platte and Colorado River basins, now projected to occur within the next six to eight months, and suggest appropriate modifications to the Act. We are, therefore, requesting a one year reauthorization of the Act which will allow time to determine if the provisions of Section 2(c)(2) of the Endangered Species Act can be implemented successfully:

"It is further declared to be the policy of Congress that the federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with the conservation of endangered species."

Mr. BREAUX. Next we will hear from Dr. Robert Davison.

STATEMENT OF ROBERT DAVISON, LEGISLATIVE REPRESENTATIVE, NATIONAL WILDLIFE FEDERATION

Mr. DAVISON. Thank you, Mr. Chairman.

My statement will focus on the protection of endangered species in the face of water development in the West. Before turning to those issues, however, I will make three very brief points.

First, we join Michael Bean in supporting and asking this subcommittee to provide increased protection for plant and candidate species. Second, the National Wildlife Federation recommends increasing annual authorizations for the Endangered Species Act to roughly \$100 million over the next 5 years. And, third, we believe that longer reauthorizations of the act are needed.

Frequent amendments to the Endangered Species Act and the corresponding frequent regulatory revisions have hampered implementation of the act, causing uncertainty and misallocation of extremely limited resources within the endangered species program. Look, for instance, at the regulations implementing the section 10 and section 4 amendments enacted on October 13, 1982. They were made final less than 6 months ago. Moreover, the section 7 regulations for the 1982 amendments were proposed on June 29, 1983, but have yet to be finished. Thus, although none of the major changes made in 1982 have been fully in place for more than 6 months, some are willing to charge these improvements to the Endangered Species Act are not working and that Congress needs to undertake more revisions. This endless tinkering with the act has kept the Fish and Wildlife Service in a perpetual stage of rulemaking, which is not in the interest of endangered species protection or economic development.

Additionally, we fail to see how Congress can make sound judgments on alleged problems with the Endangered Species Act based on never more than 18 months of experience with any given version of the law.

Let me turn now to the National Wildlife Federation's principal concern in this reauthorization, and that is the protection of endangered and threatened species that depend on aquatic and riverine habitats in the West. The problem from our perspective is that a number of species, including somewhat obscure fish such as the Colorado squawfish and the humpback chub, and more glamorous birds like the whooping crane, are near extinction because dams and other water projects have destroyed their habitat. The conflicts between endangered species protection and water development are greatest on the Colorado and Platte River systems. Four species of fish native to the Colorado River system, the Colorado squawfish, the humpback chub, the bonytail chub, and the razorback sucker are near extinction because of water development. Seventeen dams and other projects in the river's lower basin—below Glen Canyon Dam—are storing, consuming, or diverting all but 4 percent of the water coming from upstream. No squawfish exist in the lower basin anymore, and only one population of each of the two chub species remain.

The status of these fish is dramatic evidence of the consequences of uncontrolled water development on endangered species. Above Glen Canyon Dam, in the upper basin, water projects have cut river flows 35 percent. By the end of the decade, only 5 percent of the water available for use will be left. The consequences are that 50 percent of upper basin habitat for the Colorado squawfish, which was once abundant enough to be harvested commercially, has been destroyed.

Over its entire range in the Colorado River system, in the upper and lower basins, 75 percent of that fish's habitat has been destroyed. Two humpback chub populations remain in the upper basin, and perhaps no population of bonytail chub.

The story is much the same for the whooping crane, piping plover, and interior least tern, which rely in part on habitat in central Nebraska's Platte River. During the past 50 years water development there has reduced annual river flows 75 percent and nar-

rowed the critical river channel habitat for the whooping crane 90 percent. This area is also important habitat for waterfowl in the Central Flyway.

We hear much about the need to strike a balance between water development and endangered species protection, but we are fast nearing the point where 80 to 95 percent of the available water in these two river systems has been appropriated for development. So I think we are no longer talking about how to divide up the pie of natural riverine habitat, we are talking about what we are going to do with the last remaining sliver.

Now, let us look at how water development interests have fared under the Endangered Species Act. Since the act was passed in 1973, no Western water project has ever been prevented ultimately from going ahead because of the act. Even the most controversial projects have proceeded. In the Upper Colorado River Basin, in fact, the Fish and Wildlife Service's approach to water development has been all too reasonable, to the point where that agency, we believe, is largely abdicating its responsibilities under the act. The Service has looked at 81 water projects in that basin since 1977. Only nine were found to jeopardize the endangered fishes. Those findings were all made prior to 1981.

Since 1981 every water project in the upper basin—32 so far—and tomorrow it will be 33—has been allowed to go ahead under so-called Windy Gap opinions. These opinions, named after the first project to receive one, find no jeopardy to the species from projects provided that the projects help fund studies to determine the impact of their water depletions on the endangered fishes.

In the case of the Windy Gap project, the Fish and Wildlife Service agreed to allow the project to proceed while a 3-year study was conducted to determine the project's impact. Construction of the Windy Gap project was finished before the studies on its impact were completed. Thus the Service put itself in the untenable position of being unable to change the timing or the amount of water released from Windy Gap, even if their studies indicate somewhere down the line that such changes are necessary to protect the fish. And this error has been repeated 31 times in the past 4 years.

It is anticipated now that unless Congress acts to the contrary, 28 additional projects will receive Windy Gap opinions that will allow them to be constructed while data on the endangered fish needs and the effectiveness of habitat manipulation is evaluated. Thus in a 4-year period, more than 600,000 acre-feet of water will have been allowed to be taken from the Colorado River's upper basin, despite the fact that the Fish and Wildlife Service does not know what effect these depletions will have on the continued existence of the endangered fish or whether intensive habitat manipulation will be successful in offsetting any impacts.

The National Wildlife Federation maintains this Windy Gap process does not provide the protection for endangered species that is required by the act, and we urge Congress to direct the Fish and Wildlife Service to discontinue this practice.

When other Federal agencies or permit or license applicants will not concur to an extension of consultation, the Fish and Wildlife Service may indeed be forced to render a biological opinion on the basis of inadequate information. In this situation the Fish and

Wildlife Service should issue a jeopardy opinion subject to reevaluation on the basis of new information, if any. In the alternative, the Federal agency involved or project sponsor can seek an exemption where irresolvable conflicts exist.

The National Wildlife Federation and other conservation organizations helped streamline the exemption procedure in 1982 in response to complaints by spokespersons such as Roland C. Fisher of the Colorado River Water Conservation District that the process was "time consuming." Notwithstanding that amendment, no water project has attempted to use the exemption process.

Issuance of jeopardy opinions is especially appropriate in the context of water depletions in the Upper Colorado River Basin and their effects on endangered species. As outlined above, the entire history of water development in the basin has led to a decline in these species. While it may be possible to develop more precise information on these impacts, it is pretty clear that these projects, particularly when taken cumulatively, are adversely affecting habitat to the point that the fish are nearly extinct.

Given this context, the Fish and Wildlife Service has no business issuing no-jeopardy opinions that allow irretrievable commitment of resources simply because the impact of a particular project cannot supposedly be precisely documented. Letting 60 projects be built is not an acceptable means of more precisely determining their impacts. If section 7's prohibition of jeopardy has any valid meaning, it means that the onus should be put on the projects' sponsors to demonstrate that their projects are not likely to jeopardize endangered species singularly or cumulatively, instead of putting it on the Fish and Wildlife Service to demonstrate jeopardy. This forces the project's sponsor to bear the burden of any uncertainty there may be instead of having the species bear that burden. Certainly if the Fish and Wildlife Service issues a jeopardy opinion, new information can require further analysis. However, in the spirit of section 7(d), that second look must occur before the project is built. Otherwise we run the unacceptable risk of taking so long to prove conclusively the cause of the fish's decline that it is too late to save the species.

That means, of course, that some projects are not going to go forward in the face of inadequate information. But such consequences are going to occur if the act is going to prevent extinction of species. I do not think it should be surprising that there are some conflicts in the Upper Colorado River or Platte River Basins, given the contradictory goals of protecting riverine habitat to ensure the survival of endangered species and maximizing water development. The existence of such conflicts is not an indication of problems with the Endangered Species Act or that the act needs to be amended.

The Endangered Species Act currently provides flexibility sufficient to resolve most conflicts. Administrative solutions are possible and are being pursued for both the Upper Colorado and Platte River Basins, and we support those attempts. Such solutions, however, must be consistent with the goals and requirements of the Endangered Species Act to conserve endangered species and the ecosystems upon which they depend.

I would note also that issuance of the 32 Windy Gap opinions and the intentions to issue 28 more are foreclosing alternatives that the coordinating committee for the Upper Colorado River Basin may be able to come up with. Nevertheless, although such administrative solutions are possible, I think we should expect the Endangered Species Act occasionally to prevent construction of projects or force them to seek exemptions. These requirements of the Endangered Species Act, while producing occasional conflicts, have had the beneficial effect of encouraging increased interest in water conservation in the West and have also forced closer scrutiny of marginal projects.

That concludes what I would like to say on the Endangered Species Act, Mr. Chairman. Thank you.

Mr. BREAUX. Thank you very much, Dr. Davison.

[The prepared statement of Robert Davison follows:]

**PREPARED STATEMENT OF DR. ROBERT P. DAVISON, FISHERIES AND WILDLIFE DIVISION,
NATIONAL WILDLIFE FEDERATION**

On behalf of the National Wildlife Federation (NWF), I appreciate this opportunity to submit the following statement on the Endangered Species Act of 1973, as amended (ESA).

The NWF is the world's largest conservation-education organization. We have over 4.5 million members and supporters throughout the U.S. and 51 affiliated statewide and territorial organizations. Since the formation of the NWF in 1936, our members, affiliated organizations and staff have supported and worked aggressively for protection of endangered and threatened species. In 1956, ten years before enactment of the nation's first endangered species law, the NWF's National Wildlife Week theme was "Save Endangered Species." Since 1970, the NWF has distributed over a million pieces of educational literature on endangered species, and undertaken numerous legislative and legal efforts to protect endangered species. These efforts continue today as we seek reauthorization of a strong ESA.

LONGER REAUTHORIZATIONS OF THE ESA ARE NEEDED

The current ESA has been the subject of close scrutiny, discussion, and major changes in 1978, 1979, and most recently, 1982. Now, less than 3 years later we are again considering further revisions to the Act. These frequent amendments to the ESA and the corresponding frequent regulatory revisions have hampered effective implementation of the Act, resulting in instability, uncertainty, inefficiency and misallocation of extremely limited resources within the endangered species program.

Problems with the current frequency of reauthorization of the ESA are best illustrated by the pattern of amendment and promulgation of regulations for Section 4 and 7 of the ESA. Section 4 and Section 7 regulations for the ESA amendments of 10 November 1978 were not completed until February 1980, two months after additional amendments to these Sections were enacted into law. The U.S. Fish and Wildlife Service (FWS) then had less than 2 years experience in implementing these regulations before Congress again began consideration of even more changes to the ESA. Regulations implementing the Section 10 and Section 4 amendments enacted on 13 October 1982 were made final less than 6 months ago (27 August and 1 October 1984, respectively). Moreover, the Section 7 regulations for the 1982 amendments were proposed on 29 June 1983 but have yet to be finished. Thus, although none of the major changes made in 1982 have been fully in place for more than 6 months, some are willing to charge that these improvements to the ESA are not working and that Congress needs to undertake still more revisions. This endless tinkering with the Act has kept the FWS in a perpetual stage of rulemaking, which is not in the interest of endangered species protection or economic development. Additionally, we fail to see how Congress can make sound judgments on alleged problems with the ESA based on never more than 18 months of experience with any given version of the law.

Longer reauthorization periods are essential to allow amendments to be implemented and evaluated adequately. For that reason the NWF strongly urges Congress to extend the ESA for 5 years.

FEW CHANGES IN THE ESA ARE NEEDED

Twelve years of experience with the current ESA has demonstrated that it is fundamentally sound. While the NWF supports some amendments to the ESA, those seeking major changes in how the Act works should bear a heavy burden of proof to demonstrate that such changes are necessary.

Compelling evidence has been submitted to this Subcommittee by the Environmental Defense Fund and Natural Resources Defense Council and others to demonstrate the need for additional provisions in the ESA to provide incremental increases in protection for plant and candidate species. Presently, the only prohibition on taking of protected plants is a ban on collecting these species from areas under federal jurisdiction. As such the current ESA does not protect listed plants from many of the common activities that threaten their continued existence. In addition, more than a thousand U.S. plant and animal species have been identified as candidates for listing but because of inadequate funding and staffing more than 25 years will be required just to extend protection to these species already known to be threatened or endangered. Many of these candidate species have suffered serious declines since being identified and cannot wait 25 years to receive some measure of protection. Therefore, the NWF encourages this Subcommittee to support proposals to help stem the further destruction of threatened and endangered plants and of candidate species known to be imperiled.

THE FWS IS NOT FULLY IMPLEMENTING THE ESA

Other relatively noncontroversial amendments to improve the Act may be warranted in addition to those for plants and candidate species. However, the problems thwarting this nation's endangered species efforts do not lie with the ESA, which is well designed to allow economic development consistent with the protection of endangered and threatened species and the ecosystems upon which they depend. The problems lie instead with the limited implementation of the law by the FWS. What is needed is to have the FWS administer the ESA as it is written and as Congress clearly intended.

The most serious factor preventing the FWS from fulfilling its responsibilities under the ESA is the wholly inadequate funding provided to the program over the past 12 years. As indicated above and in other testimony before this Subcommittee, more than a thousand U.S. species are known to be in need of and eligible for listing under the ESA. Yet at current levels of funding and manpower the FWS is managing to list only about 40 species per year since 1973 and less than half that since 1981. Moreover, there are more than 2,700 species that may be in need of the protection provided by listing but for which the FWS needs further information to decide whether such action is warranted.

Lack of money and sufficient personnel also have in large part prevented the FWS from making progress toward the goal of the ESA to recover species to the point where they are no longer in need of protection. Providing funds and personnel to aid species to the point where they can be removed from the ESA's list of every bit as important as providing resources to add new species to that list. Present levels of commitment to species recovery have limited FWS efforts largely to high priority actions for "glamour" species. An effective endangered species program requires support for a balanced effort directed at recovery of all listed species.

Insufficient funding and staffing also place the FWS at a serious disadvantage in meeting its requirements under Section 7 of the Act. For example, in its fiscal year 1986 budget request the Bureau of Reclamation has requested \$500,000 to find a means of removing the current FWS biological opinion that the Bureau's Narrows project on the South Platte River in northeastern Colorado will likely jeopardize the survival of the whooping crane. The FWS must participate in this effort but has only \$2.5 million available to meet all of its consultation responsibilities nationwide. This tremendous imbalance in resources threatens to drive the effort on Narrows in a manner that is not consistent with the ESA or the continued survival of the whooping crane.

To ensure that the FWS is able to fulfill its listing, recovery, consultation and enforcement responsibilities under the ESA, the NWF joins Environmental Defense Fund et al. In urging this Subcommittee to increase annual authorizations to roughly \$70 million over the next five years. We ask also that the authorization for the Section 6 cooperative program with the states be increased to \$25 million over the same period.

Section 6 was enacted to encourage the states and the FWS to work together to conserve threatened and endangered species. Through the cooperative agreement provisions of Section 6, Congress intended to vest much of the responsibility for

managing federally-protected species in state officials. Furthermore, Congress wanted the valuable personnel resources and expertise of the state game and fish agencies to be utilized in its endangered species program. Unfortunately, Congress has seen fit to spend only about \$32 million over the past 12 years for the implementation of Section 6. It is time Congress demonstrated a greater commitment to a full partnership with the states.

The second major factor preventing full implementation of the ESA is the increasing reluctance of the FWS to issue jeopardy opinions for projects where required by the Act. This practice is most apparent in the FWS' "innovative" biological opinions on water projects in the upper Colorado River basin, in which "no jeopardy" opinions are issued allowing projects to proceed in clear contradiction of the ESA's requirements. These co-called "Windy Gap" opinions and other western water issues are discussed in greater detail below.

THE CONTINUED EXISTENCE OF A NUMBER OF SPECIES DEPENDS ON ADEQUATE INSTREAM FLOWS IN WESTERN RIVERS

One of the principal reasons for the near demise of a number of species that depend on aquatic habitats in the West is water development along rivers such as the Colorado and Platte. Relatively obscure species of fish like the humpback chub and Colorado squawfish and more glamorous species of birds such as the whooping crane need properly timed stream flows of sufficient magnitude to maintain their habitat and ensure their survival. This central fact must be kept in mind in any discussion of western water and endangered species issues. There may be legitimate disagreement over the exact magnitude, timing and temperature of water flows for these species, but there can be no legitimate disagreement that such requirements exist.

Construction of dams to divert water for agricultural, industrial or municipal purposes or to generate electricity has turned many turbulent western rivers with tremendous fluctuations in stream flows into a series of large lakes from which consistently cold water is released in relatively constant flows year around. These changes and reductions in river flows have made much habitat so unsuitable for some wildlife species that they are now in danger of becoming extinct because they are unable to adopt to the new flow regimes.

Four species of fish native to the Colorado River system, the humpback chub, bonytail chub, Colorado Squawfish and razorback sucker are near extinction. Development of water-related projects in the river system is contributing directly to the decline of these four endangered fish species. As increasing volumes of water from the river are diverted, stored or consumed, there has been and continues to be a concomitant decline in the amount, variety, and quality of habitat available for the endangered fishes. This habitat decline, in turn, leads to increased competition for food, greater vulnerability to predators, greater likelihood for disease outbreaks and die-offs, and reduced reproductive success.

Little natural riverline habitat remains in the lower basin of the Colorado River system. Construction of 17 dams plus other major diversion projects between 1909 and 1966—before enactment of the ESA—depleted most of the available water in the lower basin (only 4 percent of the flow from the upper basin remains unappropriated), eliminated the Colorado squawfish, and destroyed historic habitat for the humpback and bonytail chub. Only one population of the humpback chub now exists, at the mouth of the Little Colorado River. What may be the nation's last remaining bonytail chub population is found in Lake Mohave. It is old, non-reproducing, and being supplemented by hatchery-reared fish. The status of these fish in the lower basin of the Colorado River is a dramatic example of the consequences of uncontrolled water development on endangered species.

Major water development in the upper basin of the Colorado River began in 1952 and continued with project construction under the Colorado River Storage Project Act in the early 1960's. Nine major dams and other water diversions reduced water flows 35 percent—3.9 million acre-feet, of an estimated 10-year average annual total river flow of 11 million acre-feet. By the end of this decade only 300,000 acre-feet or 5 percent of the 5.5 million acre-feet of water available for appropriation in the upper basin will be left. Here, as in the Colorado River's lower basin, water development has altered the natural riverine habitat by reducing spawning and rearing areas, altering river channel characteristics, affecting water temperature, salinity, and turbidity, and obstructing migrational habits of the endangered fish. The decline in the abundance and distribution of the endangered fish in the upper basin has been documented since the development of Flaming Gorge Reservoir and other large water development projects in the early 1960's. Fifty percent of the upper

basin habitat for the Colorado squawfish, which was once abundant enough to be harvested commercially, has been lost. A mere 25 percent of the endangered fish's original 2,500 miles of riverine habitat in the upper and lower basins remains. Only two populations of humpback chub exist in the upper basin's deepwater canyons below Grand Junction. It is not known whether there are any populations of the bonytail chub, which were historically found in open river areas of main channels, in the upper Colorado River basin.

The story is much the same for the endangered whooping crane and the piping plover and interior least tern (both proposed for listing), which rely in part on the habitat of Nebraska's Platte River. During the past 50 years, water development has reduced annual flows in the Platte River from 4,000 cubic feet per second (cfs) to roughly 1,000 cfs. Over the same period annual peak flows have been cut approximately 70 percent. This tremendous loss of water flows has narrowed the river channel in the area of critical whooping crane habitat by as much as 90 percent. Sandbars, maintained and created by high spring river flows, once were used by whooping cranes for feeding and resting on their long migration from Canada to the Texas coast and by nesting piping plovers and interior least terns. Now, many of these sandbars are no longer scoured by the river's water and they have become choked with woody vegetation and the formation of new sandbars has slowed greatly. In the reach of the Platte River just above the whooping crane's critical habitat, river flows have been reduced by 65-85 percent. The area is no longer used by whooping or sandhill cranes for roosting sites.

The extent of water development and corresponding habitat destruction described above for the Colorado and Platte Rivers is important information to keep in mind in any discussion of the need for balance in our approaches to water development and endangered species protection. We are fast nearing or already have reached the point where 80-95 percent of the available water in the Platte and Colorado Rivers have been appropriated. We are no longer talking about how to divide up the pie of western riverine habitats, we are talking instead about what will happen to the last remaining sliver of that pie. It is well past the time when the balance should shift from unlimited water development toward protection of endangered and threatened species.

WESTERN WATER PROJECTS SHOULD NOT GET SPECIAL TREATMENT UNDER THE SEA

Since the ESA was passed in 1973, all projects, including western water projections, that are funded, approved or carried out by a federal agency must take steps to protect endangered species and their habitats. No western water project has ever been prevented ultimately from going ahead because of this or any other ESA provision. Even the most controversial projects have proceeded. Special provisions in the ESA to prevent or limit the FWS' ability to require projects to provide the instream flows necessary for protection of endangered species or their habitats are not warranted. No species is any less jeopardized nor its habitat any less adversely affected by the unbridled exercise of state water rights than by the exercise of any other property rights. Congress already has provided western water developers and others with three specific and limited types of "escape valves" for conflicts between endangered species protection and economic development. First, western water projects must be offered "reasonable and prudent alternatives" (i.e., mitigation measures) whenever possible, allowing projects that would otherwise jeopardize a species' existence to proceed with out causing harm. Second Congress created an Endangered Species Committee to review irresolvable conflicts and empowered it to allow projects to proceed even if they cause the loss of a species. Finally, Congress can pass specific legislation to exempt a project from the ESA's requirements. Western water developer claims that the ESA stops projects must be viewed with these criteria in mind: First, is there an irresolvable conflict or are there reasonable and prudent alternatives? Second, if there is an irresolvable conflict, has the developer applied for an exemption from the Endangered Species Committee? No western water project satisfies these criteria.

One illustrative and controversial western water project that already has attracted Congress' attention is the proposal of Riverside Irrigation District and Public Service Company of Colorado (Riverside) to construct a dam and reservoir on Wildcat Creek, a tributary of the South Platte and Platte Rivers in northeastern Colorado. Riverside sought to proceed with construction under a Section 404 general permit which exempts certain activities, arguably including Riverside's proposed dam, from the requirement of an individual permit, subject to a number of conditions. One such condition precludes activities that may affect an endangered species. While considering whether Riverside qualified to proceed under a general permit,

the Army Corps of Engineers (Corps) consulted with the FWS as required by the ESA. The consultation on the Riverside dam resulted in a 1979 biological opinion by the FWS that water depletion by the project would jeopardize the endangered whooping crane. A subsequent 1982 opinion by the FWS confirmed the earlier determination. Based on the FWS' biological opinions, the Corps informed Riverside that the dam could not be built under a general permit and that an individual 404 permit would be required. However, the FWS' second biological opinion proposed two mitigation measures that would eliminate the threat posed by Riverside to the whoopers. Riverside could provide 1100 cfs of water in the critical Platte habitat in the spring and fall or maintain a strip of the river channel 500 feet wide and 1.7 miles long (102 acres) free of vegetation. At Riverside's request, FWS calculated that maintaining 102 acres of Platte River habitat in perpetuity would cost \$193,000. In Riverside's estimate, the cost of mitigation equals approximately two-thirds of one percent (0.67%) of the total project cost and less than the cost of one month's delay. Rather than accept either reasonable and prudent alternative or apply for exemption, Riverside elected to pursue litigation and to combat Colorado electric rate payers to monthly delay costs of hundreds of thousands of dollars.

In the upper basin of the Colorado River the FWS' approach to water development has been even more "reasonable", to the point of largely abdicating its responsibilities under the ESA. Of the 81 consultations completed by the FWS on water-related projects from 1977 to date, only 9, all prior to 1981, resulted in biological opinions that found jeopardy to endangered species. From the standpoint of allowing water development to proceed, therefore, the ESA appears to be working relatively well. However, FWS is trying so hard not to stand in the way of water development that in the process they are failing to provide the protection required by the ESA.

CONGRESS SHOULD REJECT THE FWS' WINDY GAP APPROACH TO WESTERN WATER PROJECTS

Of those 81 biological opinions rendered by the FWS for water-related projects in the upper Colorado River basin, 32 were so-called "Windy Gap" "no jeopardy" opinions. These are named after the first water project to receive such an opinion. The FWS found that operation of the Windy Gap project would not jeopardize any endangered species provided that certain conservation and recovery measures were carried out. Among these measures was provision of sufficient funds for a 3-year study "to evaluate habitat improvement techniques for the endangered fish species and to continue collection of physical data needed to assess the impacts of water depletions, sedimentation, and water quality changes on the life cycles of the fishes (emphasis added)." Thus, without knowing the effect of water depletions on the endangered fishes the Windy Gap project was allowed to proceed with an average annual diversion rate of 57,300 acre-feet and a maximum diversion of 93,000 acre-feet in any one year. The project, in fact, was constructed before the completion of the three-year study. Thus, the FWS put itself in a position where they would be unable to alter the timing or magnitude of water releases by Windy Gap even if the studies indicated such changes were necessary. Perhaps the FWS could have compensated on subsequent projects for any harm to the endangered fishes caused by inadequate information on the effects of Windy Gap. However, since that opinion was issued in 1981 the FWS has allowed 31 additional projects—every water project in the upper basin since Windy Gap—to go forward while it conducts further study.

To fund the estimated \$25 million needed for these additional studies, fish stocking and habitat modifications, the project sponsors were assessed a fee based on the quantity of water proposed to be depleted and the volume remaining after flows to the lower basin are delivered. In total, these 32 projects have depleted or will soon deplete 415,200 acre-feet of water from the upper Colorado River basin. Moreover, biological opinions are overdue or due shortly on another 28 projects that will deplete at least 184,000 additional acre-feet of water from the upper basin.

It is anticipated that unless Congress acts to the contrary, these 28 projects will receive Windy Gap opinions that will allow them to be constructed while data on the endangered fishes' needs and the effectiveness of habitat manipulation is evaluated. Thus, in a four-year period more than 600,000 acre-feet of water will have been allowed to be taken from the Colorado River's upper basin despite the fact that the FWS does not know what effect these depletions will have on the continued existence of the endangered fishes or whether intensive habitat manipulation will be successful in offsetting any impacts. The NWF maintains that this Windy Gap process does not provide the protection for endangered species that is required by the Act. We urge Congress to direct the FWS to discontinue this practice.

When other federal agencies or permit or license applicants will not concur to an extension of consultation, the FWS may be forced to render a biological opinion on

the basis of inadequate information. In this situation the FWS should issue a jeopardy opinion subject to re-evaluation on the basis of new information, if any. In the alternative, the federal agency involved or project sponsor can seek an exemption where irresolvable conflicts exist. The NWF and other conservation organizations helped streamline the exemption procedure in 1982 in response to complaints by spokespersons such as Roland C. Fischer, Colorado River Water Conservation District, that the process was "time-consuming." Notwithstanding that amendment, no water project has attempted to use the exemption process.

This approach is especially appropriate in the context of water depletions in the upper Colorado River basin and their effects on endangered fish species. As outlined above, the entire history of water development in this basin has led to a decline in these species. It is difficult to ignore the fact that declines in the quantity and quality of water in the habitats to which these fish species have adapted means fewer fish. That point is already evident.

While it may be possible to develop more precise information on these impacts it is pretty clear that these projects, particularly when taken cumulatively, are adversely affecting habitat to the point that the fish are near extinction. Given this context, FWS has no business issuing "no jeopardy" opinions that allow irretrievable commitment of resources simply because the impact of a particular project cannot, supposedly, be precisely documented. Letting 60 projects be built is not an acceptable means of more precisely determining their impacts. If Section 7's prohibition of jeopardy has any valid meaning, it means that the onus should be put on the project sponsors to demonstrate that their projects are not likely to jeopardize endangered species (singularly or cumulatively), instead of putting it on the FWS to demonstrate jeopardy. This forces the project sponsor to bear the burden of any uncertainty there may be, instead of having the species bear that burden. Certainly if the FWS issues a jeopardy opinion, new information can require further analysis. However, in the spirit of Section 7(d) that "second look" must occur before the project is built. Otherwise you run the risk of taking so long to prove conclusively the cause of the fishes' decline that it is too late to save the species. That means, of course, that some projects are not going to go forward in the face of inadequate information. But, as we note below, such consequences are going to occur if the Act is going to prevent extinction of species.

WE SHOULD EXPECT SOME CONFLICTS BETWEEN THE ESA AND WESTERN WATER DEVELOPMENT

It should not be surprising that there are some conflicts in the upper Colorado River or Platte River basins given the contradictory goals of protecting riverine habitat to ensure the survival of endangered species and maximizing water development. The existence of such conflicts is not an indication of problems with the ESA or that the Act needs to be amended. The ESA currently provides flexibility and guidance sufficient to resolve most conflicts. Administrative solutions are possible and are being pursued for both the upper Colorado and Platte River basins. Such solutions, however, must be consistent with the goals and requirements of the ESA to conserve endangered species and the ecosystems upon which they depend. Nevertheless, we should expect the ESA occasionally to prevent construction of projects or force them to seek exemptions. These tough requirements of the ESA, while producing occasional conflicts, have had the beneficial effect of encouraging a renewed interest in water conservation in the West. The ESA also has forced closer scrutiny of marginal projects.

SOME FINAL THOUGHTS ON RESOLVING CONFLICTS BETWEEN ENDANGERED SPECIES PROTECTION AND WESTERN WATER DEVELOPERS

To protect the habitat and insure the survival of endangered species like the Colorado squawfish and whooping crane, sufficient water flows in the Colorado and Platte River basins must be maintained. The NWF assumes that western water developers agree with the goal of protecting endangered species. How, then, would they achieve this goal if they prevent the ESA from maintaining adequate instream flows for endangered species dependent on western rivers?

Offsetting the destruction of habitat from reduced water flows with construction of hatcheries and other artificial devices, as the FWS and some western water interests recommend, is completely inconsistent with the goal of the ESA to preserve the ecosystems upon which threatened and endangered species depend.

Those that argue that the federal government should purchase water rights to maintain stream flows needed by endangered species also must be willing to support necessary appropriations by Congress for these purchases. And they must be willing

to make final project approval contingent upon the appropriation of funds for this purpose. Finally, they also must be willing to support federal legislation or changes in their own state laws to overcome the following obstacles:

1. The federal government needs to condemn water rights in order to obtain rights of sufficient seniority to maintain adequate flows.

2. State laws must recognize the maintenance of stream flows as a valid exercise of water rights.

3. The ability to acquire rights to maintain stream flows must not be limited to the state alone, as it is in some western states.

4. State laws must allow for interstate water allocation, i.e., acquisition of a water right in one state for the purpose of exercising it in another.

Finally, it should be recognized that there is no way to amend the ESA to allow western water project to go forward regardless of their impact on riverine habitat, short of project-by-project exemptions, without adversely affecting endangered species throughout this nation.

Thank you for this opportunity to present our views. We look forward to working with this Subcommittee on a 5-year reauthorization of increased funding for the ESA.

Mr. BREAUX. Next we will hear from Mrs. Niels Johnsen.

STATEMENT OF MRS. NIELS JOHNSEN

Mrs. JOHNSEN. Mr. Chairman, the Garden Club of America appreciates this opportunity to speak at this hearing on the reauthorization of the Endangered Species Act. We have submitted written testimony.

Concern for endangered species is not new to the 185 Garden Club of America clubs, with a membership of 15,000, representing 38 States and Washington, DC. Postcards, calendars, and posters on endangered species have been distributed. Future involvement will be to adopt an endangered species and question the origin of purchased plants.

Our members strongly support the goals of this act and urge its reauthorization, with the inclusion of many more plants, for the listing of endangered species of plants still lags behind that of animals.

The Garden Club also urges an amendment to the act prohibiting the collecting or taking of plants from non-Federal lands, as suggested by Mr. Bean. Such taking, for sale locally, private collecting for home gardens, and collection for scientific research or for herbarium specimens, is sufficient to threaten the survival of the rarest species.

The amendment would also prohibit vandalism against plants which occurs, intentionally or unintentionally. This threat is not addressed by the present act. We feel this amendment will strengthen the act, for plants are more important to us than we are to them.

Thank you very much, Mr. Chairman.

Mr. BREAUX. Thank you very much, Mrs. Johnsen. We appreciate your comments. We appreciate the comments of everybody on the panel.

[The prepared statement of Mrs. Niels Johnsen follows:]

PREPARED STATEMENT OF MRS. NIELS W. JOHNSEN, PRESIDENT, THE GARDEN CLUB OF AMERICA

Mr. Chairman, The Garden Club of America, a nation-wide organization with 15,000 members, appreciates this opportunity to present our views on the reauthorization of the Endangered Species Act. Our members strongly support the Act's goals and wish to see it reauthorized with language at least as strong as at present.

If we may, we would like to direct the Subcommittee's attention to a major weakness in the Act: it fails to provide protection for endangered plant species equal to that for endangered animal species. In part, this discrepancy arises from the contents of the law itself. However, some of the problems stem from policy decisions made by the implementing agencies. We hope the Congress will help correct both types of deficiency.

The endangered Species Act currently seeks to protect listed plant species from a variety of possible threats, including harm from actions authorized, funded or carried out by a federal agency (Sec. 7) and unauthorized import, export, or interstate trade. Furthermore, the Act prohibits removal and reduction to possession of listed plant species from areas under federal jurisdiction [(Sec. 9(a)(2)] However, the Act does not address many of the common threats to listed plants and candidates for listing. Of the 85 plants now listed under the Act, over one-third were listed primarily because of substantial threats from commercial or non-commercial collecting. Among these are 22 cactus, *Agave arizonica*, *Dudleya traskiae*, *Rhododendron chapmanii*, *Trillium persistens*, *Sarracenia oreophila*, and several others. Another threat, especially for many of the western species, is off-road vehicles. Finally, development projects which may not trigger a Section 7 jeopardy opinion also threaten listed plant species. None of these threats is adequately addressed by the current Act.

Commercial or Private Collecting on Private Land.—Unless the plants are offered for sale in interstate commerce, the Act does not prohibit taking from lands private or state ownership. Unprotected lands include nature preserves owned or managed by state and local governments or private conservation groups such as The Nature Conservancy. The landowner's only recourse is to any applicable state law, including trespass laws, that usually have negligible penalties.

Such taking, for sale locally, private collecting for the home garden, and collection for scientific research or for herbarium specimens, is sufficient to threaten the survival of the rarest species. Furthermore, we have heard of an extensive "underground network" dealing with the collection and exchange of wild-collected, endangered native plants.

Several species of listed or proposed species are documented as having suffered from over collecting.

The Virginia round-leaf birch, *Betula uber*, was listed as endangered in 1979. This tree has fewer than a dozen adults and saplings and a few dozen seedlings. All the latter are on private property. In the spring of 1984, someone collected or destroyed 18 of these priceless seedlings, which carried the species' hopes for survival. The Nature Conservancy is negotiating a protection agreement with the landowner, but neither will be able to prevent a repetition of this disaster.

Rhododendron chapmanii, the Chapman's rhododendron, is one of the loveliest of the native rhododendrons with brilliant pink blossoms. It is listed as endangered and is native to the pinelands of Florida. Before the listing, one of only four known populations was totally eliminated when its location was discovered by collectors. The fact that propagated plants are offered for sale is evidence of a continuing interest in this species. The Nature Conservancy is currently trying to acquire part of the habitat for this valuable species, but would not benefit by the current provisions of the Act for this highly collectable species.

Pediocactus knowltonii, Knowlton's cactus, was one of the first to be listed as endangered. Perhaps more than any other U.S. cactus, this species is a collector's item desired in private collections because of its diminutive size and large flowers. Its population was reduced to 1,500 by 1981. The landowner could not always prevent people from entering his land, which is close to a road. The land has recently been acquired by The Nature Conservancy, who, like the previous landowner, does not benefit by the ESA unless the collections are involved in interstate trade.

Two species of *Cereus*, tall cacti native to Florida, face threats from private collecting and vandalism with guns and machetes. *Cereus eriophorus* var. *fragrans*, the fragrant wooly cactus, is soon to be proposed as endangered by the FWS. The population is limited to 40–50 plants on private lands adjacent to a state park. Recently, scientists discovered a "suspicious bunch of holes" near the sole population, leading authorities to suspect that plants had been collected only a short time ago. *Cereus robinii*, the Key tree-cactus, is a listed endangered species found on the Florida Keys and in Cuba. The Florida population is on both private and public lands. About ten years ago, a now defunct nursery reduced populations of several *Cereus* species, including *C. robinii*, from one isolated grove on the key.

Non-Commercial Interstate Trade.—Under the current Act, it may be legal to collect listed plants to send as "gifts" to friends. A recent example concerned the green pitcher plant, *Sarracenia oreophila*. This species is one of the rarest insectivorous plants in the world and highly sought after by the specialist collector of bog plants.

It is listed as "endangered". In 1984, a man from Florida traveled to Alabama to collect plants, returned to Florida and mailed specimens of the wild-collected plants to several people in other states. Since it was not clear whether he expected something of value in return, there was doubtful authority to prosecute this man under the Act, despite the presence of witnesses to the interstate movement of the plants.

Vandalism can occur either intentionally as in the case of the round-leaf birch, or unintentionally (for example, as a result of target practice). Presently, the Act does not address this threat for plants either on private or federal lands.

Destruction of Plants and Habitat by Off-Road Vehicle Use is a serious problem for certain plants, particularly in the western United States. Although federal agencies have the obligation under Section 7 to protect listed plants from harm such as from off-road vehicles, they are not doing so adequately and may feel the need for stronger authority, especially for prosecuting offenders.

The Garden Club of America urges the Congress to improve protection for endangered plants by amending Section 9(a)(2) of the Act to prohibit: 1. All "taking" of plants on federal lands; and 2. Collecting of or vandalism against plants on private lands without the written consent of the landowner.

We turn now to the failure of responsible agencies to use the Act aggressively to protect rare plant species. We hope the Subcommittee will adopt report language instructing the Fish and Wildlife Service and Animal and Plant Health Inspection Service (APHIS) to correct these deficiencies.

First, listing of endangered plant species still lags behind listing of animal species. In 1984, the FWS listed only 14 plant species compared to 32 animal species. This preference flies in the face of the Service's own list of "candidates", which contains almost 2,600 plant species and subspecies and only 1,200 animal species. Indeed, over 1,000 of the plant "candidates" are in "category 1", meaning that their need for the Act's protection has already been established. Of course, in 1982 the Committee on Merchant Marine and Fisheries instructed the FWS to base its listing priorities on the degree of threat to the species, not whether it was a "higher" or "lower" organism. [House Report 97-567, Part 1, p. 21] We do not believe that the Service has yet responded adequately.

Second, neither the FWS nor APHIS is aggressively enforcing the prohibitions on collecting and trade already contained in the Act. APHIS has prosecuted only one plant dealer for violating the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in the decade since it came into force. FWS has not brought a single case against violators of the Act's protections for plants. We understand that informants are providing tips to these agencies, but they are not followed up.

Third, in compiling annual reports for CITES, the FWS has allowed major errors to be repeated year after year. For example, errors in reports of the U.S. imports and exports of cacti have represented up to 50% of the trade in any one year. These errors, which could be corrected by careful review of the files and consultation with APHIS, completely distort analyses of the trade upon which CITES parties base their enforcement efforts.

We request the Subcommittee to look into these problems plaguing implementation of the Act and to urge their correction.

Mr. BREAUX. Mr. Bean, you talked in terms that we are proposing species for listing, but while we have done that, actually some species have become extinct, and that the process for listing these species has taken too much time, there is not enough money, and it is not moving fast enough, et cetera. I had understood that part of the legislation allows for the emergency listing, which is a much speedier process, and I am wondering if that is not being used for those species that are having a real serious problem and in fact are becoming extinct while we wait for them to be listed under the normal process.

Mr. BEAN. Clearly, it has not been used for a substantial number of species—all those in my testimony that have gone extinct while candidates, as well as the others that have slipped precariously close to the point of extinction while candidates. For none of those has it been used. It has been used for—

Mr. BREAUX. Why not?

Mr. BEAN. I do not know that I can answer that question.

Mr. BREAUX. I would think, if I saw a species that I discovered as a biologist or a scientist that was really in danger of becoming extinct if nothing was done, I would use the emergency provision and nominate it. As I understand it, I think protection is provided from the time of nomination under an emergency procedure.

If we are not using that, I think that that is perhaps a slipup by whoever is out there looking at those things.

Mr. BEAN. The control over the listing of a species on an emergency basis is entirely in the hands of the Fish and Wildlife Service. Every one of these candidate species I identify in my statement became a candidate by virtue originally of a petition by some interested party, a scientist or conservation organization, or as the result of work done by the Fish and Wildlife Service itself.

The Fish and Wildlife Service presumably ought to be monitoring the status of these candidate species so that when serious situations arise, it can use its emergency listing authority. It apparently has not chosen to do so in the many examples of species that have gone extinct or have come very near the point of extinction.

Mr. BREAUX. But apparently neither have any of the people who are making the point that it is not moving fast enough. Neither have they chosen the method of the emergency listing request themselves.

Mr. BEAN. That is not entirely correct. There are a number of examples of which I am aware in which requests to act expeditiously to utilize the emergency listing authority have been made, but to no avail.

Mr. BREAUX. As I understand it, the way we thought it was to work was, if an organization or group or individual in the private sector nominated a plant species to be listed under emergency, that in fact was afforded protection while it was being considered. Is that not correct?

Mr. BEAN. No, that is not correct, sir.

Mr. BREAUX. How do you understand it works?

Mr. BEAN. A species only receives protection when the Fish and Wildlife Service publishes a notice that it has exercised its emergency rulemaking authority to list that species. That is the only time protection begins.

Mr. BREAUX. But of the large number that you pointed out, how many have been requested by individuals or organizations to be listed as an emergency request?

Mr. BEAN. I will have to get you that information subsequently. I do not have it available today. I am aware of at least several examples of that kind, however.

Mr. BREAUX. When you say "several," what are you really talking about? I think some of the numbers I have seen indicate there are 50 or maybe hundreds of species really that I think, according to some of the testimony, should be afforded protection right now.

Mr. BEAN. There are roughly 1,000 category 1 candidate species. These are species that the Fish and Wildlife Service has already determined are eligible to be proposed for listing but that it has not yet proposed for listing because it lacks the resources.

The question I think you ought to put to the Fish and Wildlife Service is whether it is capable of adequately monitoring the status

of those candidate species so that it can use its listing authority to protect those that begin a very precipitous decline while still candidates.

Mr. BREAUX. Well, it is going to kind of be a joint effort. There is going to be a lot of people out in the field who are going to have to start using the emergency request from that standpoint, and the Department also should be using it. If I were in your position or in the position of an organization that was concerned about a particular species, I would run in and file an emergency petition if I thought it was in danger of extinction.

Mr. BEAN. That is in fact what has been done in, as I said, at least several instances of which I am aware. Indeed it is fairly common now, when a citizen petitions the Fish and Wildlife Service to list a species, that the petition requests the Service to do it on an emergency basis. That may be the norm rather than the aberration at present, because the situation for so many of these species subject to petition is that dire.

Mr. BREAUX. Mr. Pitts, with regard to the conflicts you have had, has the exemption process that is available under the act been used to resolve these conflicts?

Mr. PITTS. Not to my knowledge, Mr. Chairman. The section 7 process was referenced by—is it Dr. Davison?—"Under this process, project proponents to date in the Colorado River Basin have proposed reasonable and prudent alternatives during the consultation process, and no projects have been held up."

To my knowledge, the exemption process has not been used in the Upper Colorado River Basin or the Platte River Basin. It has not been necessary.

Mr. BREAUX. I ask the same question I asked Michael Bean. They say the emergency process has not been used enough, and we have the exemption process and they do not think it is being used enough. I note that the whole Colorado Basin issue is involved in a conflict between the projects and the act. I do not think the exemption process has ever been utilized in even one instance, has it?

Mr. PITTS. I do not think so. I do not think it has been necessary up to this point. It is a possibility, and one we are looking at. We see the solution as being the Secretary of the Interior carrying out his responsibilities in recovering the species. That makes the exemption process unnecessary.

Mr. BREAUX. You do not really, then, I take it, have any complaints as to how they are handled? You think eventually it will be worked out to the satisfaction of the folks that you are representing?

Mr. PITTS. We are hopeful. We will know in a year. That is why we are asking for only a 1-year reauthorization of the Act.

Mr. BREAUX. I do not want to do this every 12 months, I will tell you.

Mr. PITTS. I appreciate that.

Mr. BREAUX. Bob Davison or somebody else had commented from some other perspective with regard to the Colorado River area. Are you folks satisfied that the Act in those areas is working as it was intended?

Mr. DAVISON. Well, no, we are not, Mr. Chairman. I am not surprised that Mr. Pitts is pleased with the way the Act is working.

The point of my testimony is that since 1981 the Fish and Wildlife Service has given every water project in the Upper Colorado River Basin a no-jeopardy opinion, with the proviso that those projects provide funds to study the effects that their water depletions will have on the endangered fishes. One more of those opinions is due tomorrow. There are, in addition, 27 more after that that are due probably within the next 6 months or the next year. That means every single water project in the upper river basin, 60 projects since 1981, will have been allowed to proceed while the Fish and Wildlife Service studies. As I indicated in my testimony, letting 60 projects go forward is not an acceptable means of determining the impacts of those projects.

Mr. BREAUX. Does anybody challenge any of those no-jeopardy findings in court?

Mr. DAVISON. To my knowledge, not at this point.

Mr. BREAUX. Do you disagree with the no-jeopardy finding by the Fish and Wildlife Service in any of those numbers that you cited?

Mr. DAVISON. Well, our position is that in the situation where there is inadequate information, if indeed there is inadequate information on the status of those fish or the needs of those fish or the effectiveness of the habitat manipulation practices for those fish, the appropriate response by the Fish and Wildlife Service is to issue a jeopardy opinion and say that if subsequent information indicates that the project can be built or that the 60 projects can be built without jeopardizing the species, then those projects should go ahead.

If the project sponsors or the action agencies are not happy with having to wait for the results of such studies, then they can attempt to apply for an exemption.

Mr. BREAUX. What I am saying is that things, according to Mr. Pitts, are moving along pretty much in a time frame that they agree with. They have not had any setbacks. I take it that the Fish and Wildlife Service would tell you that they have in fact looked at it and found that there is no jeopardy.

My concern is, if anyone disagrees with that finding, should they not be challenging it?

Mr. DAVISON. Well, in fact, what the Service is saying is "We don't know, but we are going to allow your project to go ahead while we find out."

Mr. BREAUX. I do not think the law would allow them to say, "We don't know, but we will allow you to go forward," would it?

Mr. DAVISON. Well, I would agree.

Mr. BREAUX. Maybe somebody ought to challenge that. I am not encouraging litigation, but you are saying the Fish and Wildlife Service is saying the law allows them to issue a no-jeopardy opinion based on whatever evidence they have—maybe a little bit, a whole lot, or a medium amount—but I am sure they are not issuing a no-jeopardy opinion and saying, "We don't know a lot about it, but we don't think there is jeopardy."

Mr. DAVISON. Well, I would be happy to provide the biological opinions. I think that is what they are saying.

Mr. BREAUX. Well, if they are saying that, they are legally incorrect, and if they are legally incorrect, somebody ought to call them

on it. Perhaps Congress ought to call them on it. Perhaps we in Congress ought to call them on it.

We have the statute that says a no-jeopardy opinion cannot be made just by flipping a nickel and saying, "No jeopardy," or "jeopardy." It has to be backed up by the best available data, and whether it is backed up by adequate information and evidence is a question that generally is the subject of litigation because it is a subjective ruling on the part of somebody in the Department.

Mr. Marcoux, can you tell me just for the record how we are saving the grizzly by having a hunting season on them?

Mr. MARCOUX. That is a question that should be answered.

Since 1975, when the bear was declared threatened, one of the reasons that was given at that time in establishing the current hunting season was that we would be keeping the bear wary by allowing hunting of the population, and I am talking about limited hunting, very tightly controlled, in fact to the point now where we have subquotas on female grizzlies on each side of the Continental Divide. So it is not just a wide-open type of hunt—shoot as many animals as you can. It is a very tightly controlled season process.

What we believe is that we have to basically reach an accommodation basically between man and the bear. Every time that we get into a situation where the bear comes into conflict with man, whether it is a human-injury situation, whether it is a livestock depredation situation, the bear is ultimately the loser. He loses in a couple of ways. One is that we generally end up killing the bear—lethal injection in many cases. That is an unfortunate way to have to go.

It also sets up a situation where I believe we lose respect for the bear with the public, with some of the public that has to associate directly with the bear. It also influences perceptions of the public about the value of the bear in other areas.

So we view hunting, as an opportunity for long-term preservation of the bear, and we believe it is working. We think we have more support with the type program we have ongoing. I would acknowledge that at some point, if population data would dictate that it would not be worth hunting the bear because population were going downhill, it would be prudent to do everything possible to bring populations.

Mr. BREAUX. Is your situation with regard to the grizzly different from the facts as you know them to be in the Minnesota wolf case?

Mr. MARCOUX. Well, I believe the wolf case—and I am not very familiar with their exact situation, but I believe the objective there again is to trap enough wolves to minimize conflicts so we are not into just a retaliatory situation when one causes depredation and we mobilize to get rid of that particular animal.

Mr. BREAUX. Mr. Davison, do you have any thoughts on that subject, or Mike Bean or anybody else, with respect to this issue?

Mr. DAVISON. Given our understanding of the court's decision on the wolf case, our position is that we agree with the court; that is, public hunting or trapping of a threatened or endangered species should only be allowed in extraordinary circumstances where the population pressures would warrant it.

We do not think the court's decision limits the Service's ability to take animals to control depredations or to ensure human safety.

We think basically that the proper way to proceed with sport hunting or trapping of these species is to work on the recovery of these species to the point where that can be done. That is the goal of the act, and that is what we would like to see happen.

With regard to the wolf in Minnesota, I think that species would be delisted if we had two other populations of wolves established in this country. I think such recovery efforts would be the appropriate way to proceed.

Mr. BREAUX. Mr. Marcoux, do you have any indication about the statistics regarding the grizzly bear population since you have had the type of hunting program that you have in your State? Is it increasing, decreasing, staying the same, or what?

Mr. MARCOUX. I would offer at this time, based on counsel against being too definitive in answering that question because of potential litigation, that we have several efforts ongoing in evaluating the grizzly population trends that are occurring in that Northern ecosystem. A variety of techniques are being employed, from listing the mortalities to very detailed marking of grizzlies, monitoring their movements, learning home ranges, and so forth, and we are continuing the improvement of our data base.

I would offer that we are currently going through an EIS on our own, a programmatic EIS, scheduled for a preliminary draft to come out this summer. The objective of which is to give the public, as well as the professionals, an opportunity to scrutinize the data that is available and help them in making the decision on where we go on future grizzly management.

Mr. BREAUX. Mike Zagata, you mentioned in your testimony about mitigation banking. Is mitigation banking being used, and if so, how is it working?

Mr. ZAGATA. The mitigation-banking concept is being used in compliance with section 404 of the Clean Water Act. Historically, the Fish and Wildlife Service's definition of mitigation has not included its use in the area of satisfying requirements of the Endangered Species Act, although I think some mitigation has actually been done to do that.

If you look at the *San Bruno* case, the conservation plan it provided is a form of mitigation. In regard to the mitigation-banking concept—and your question is, is it working? The permitting process has been completed for a pilot project in Louisiana. The construction is underway to implement the management, and I think that the concept has received generally broad support as long as there are specific conditions for how it can be used. There are 13 mitigation banks of some form or another underway. This will be a subject of discussion in the North American Wildlife Conference next week, so it will have an opportunity to be further reviewed by professional people.

Mr. BREAUX. Are there any problems from your perspective with companies that you represent being involved in the consultation process with regard to conflicts on endangered species? Are they being brought in? I strongly believe that as much preconsultation that is possible prior to the conflicts developing is incredibly important from your perspective and the perspective of the companies that you represent. Are we doing that?

Mr. ZAGATA. Well, there are several places where that could be improved. There are action agencies that have rejected the request for an early consultation. As you know, there are some caveats in the regulations with regard to early consultation—it has to be technically feasible or financially feasible and we do not feel that the agency should be making the judgment as to whether or not an applicant has the technical capability to fully complete the project. If the applicant, in good faith, goes to the action agency and intends to complete a project, then we would hope he would be given the courtesy of encouraging the Fish and Wildlife Service to have an early consultation. For example, mitigation banking really works when you implement your mitigation program in advance of your permit application.

So if you have an early consultation and it appears that there may be a jeopardy opinion, you can begin at that point in time to talk, on a voluntary basis, about what reasonable and prudent alternatives there might be. If you wait until you have a formal consultation, then things get polarized. So we strongly encourage the early consultation process, and also participation in the jeopardy opinion process. At this point in time the applicant, no matter who it may be, is excluded from that process by the action agency, and yet the applicant may have meaningful information.

Mr. BREAUX. Well, does the applicant not have an opportunity to present information on the status of the stock of those species that is in conflict with the project?

Mr. ZAGATA. It is totally a matter of circumstance.

Mr. BREAUX. What does that mean?

Mr. ZAGATA. It means that if the individuals involved in that particular consultation think that it has merit, they may allow you to do it. If they do not feel it has merit, for one reason or another, you do not have formal recourse by which you can be allowed to participate.

Mr. BREAUX. Are you saying this: Say one of the companies has a project that could possibly be in conflict with something that is threatened or endangered; it does not have the right, as opposed to just permission, to present what their studies would show with regard to the status of that particular stock?

Mr. ZAGATA. In essence, that is true.

Mr. BREAUX. They certainly have the opportunity to discuss and present evidence as to how their actions would not in fact conflict with the listed species, do they not?

Mr. ZAGATA. Well, you have some option to appeal if a jeopardy opinion is rendered or if the jeopardy opinion is rendered and you start talking about reasonable and prudent measures. But you are not assured the right to participate in the development of that opinion.

Mr. BREAUX. The early consultation process certainly would allow that type of discussion, would it not?

Mr. ZAGATA. Early consultation would allow you to do that if you are granted the early consultation.

Mr. ZAGATA. If you are not granted the early consultation for one reason or another, then you move to formal consultation and the action agency says, "OK, now, you made your request to us. You submitted your data. We will now make that determination."

Mr. BREAUX. Do you know of any instances when a company or an individual was denied the opportunity for consultation?

Mr. ZAGATA. There were some raised when the task force that developed this testimony was in the developmental stages. We circulated a draft and this was one of the issues that was raised by the member companies. They felt that they had actually been denied early consultation, and when you look at the regulations, there really is no provision to assure their participation. I'm not an attorney, but it is my understanding that there is no provision to participate in the actual jeopardy process.

Mr. BREAUX. Other than through consultation, which should come prior to that?

Mr. ZAGATA. That is true.

Mr. BREAUX. Mrs. Johnsen, I would take it that perhaps your recommendation would be to extend the coverage in the area you spoke about with regard to plants, to the taking of those plants on private lands as opposed to just Federal lands?

Mrs. JOHNSEN. All lands.

Mr. BREAUX. I would also probably say that a lot of people think that it would be one heck of an enforcement problem and I'm not sure how the Wildlife Service is going to look at handling that problem on private land.

Mrs. JOHNSEN. Don't you think education would help in this field?

Mr. BREAUX. Yes, but I can't write that into this law.

I think probably you are absolutely correct. I would take it that a lot of taking of a threatened plant or species is done through lack of education.

Mrs. JOHNSEN. That is correct. We have found that to be true with our garden club work of people going and just taking plants without even knowing of their value.

Mr. BREAUX. I assure you that I as chairman of the subcommittee, if I were ever put in that position of having to make that choice, I would probably flunk the test with flying colors and I dare say that probably most people would find themselves in the same position of not being able to identify the plant. Perhaps you are absolutely right that education is the real answer to that.

Do the Garden Clubs of America ever publish any kind of a picture listing of plants that are in that condition?

Mrs. JOHNSEN. We don't ourselves, but I know other organizations do. One of the main thrusts of the Garden Clubs of America is education, educating not only our members, but the public on such issues.

Mr. BREAUX. I think it would be very helpful to engage in that. I will tell you quite frankly, I don't think I have ever seen a picture list of plants that are threatened or in danger of becoming extinct. I think perhaps it probably would be very helpful.

I want to thank this panel. I think we have had some good discussion. We are going to be working with all of you here coming up with amendments that might be necessary for inclusion into the legislation. This is just a beginning. It is not the end of our effort.

So this panel will be excused.

We have, I would note, two more panels that we need to take. We will recess now for a lunch break and we would like to return

with the next two panels this afternoon. We will return at 1 p.m. this afternoon to take the last two panels.

With that, the committee will be in recess until 1: p.m.

[Whereupon, at 11:45 a.m., the subcommittee recessed, to reconvene at 1 p.m., the same day.]

AFTERNOON SESSION

Mr. Bosco [presiding]. We will call the hearing to order.

Good afternoon, ladies and gentlemen. We are going to resume the hearing on the Endangered Species Act with Panel No. 4 relative to the subject of sea otters. We welcome the panel.

Mr. Rebeck, would you like to begin, or do you have any particular order that you would like to take other than that?

Mr. REBUCK. No, Mr. Chairman, that would be fine.

STATEMENTS OF STEVEN REBUCK, REPRESENTATIVE, SAVE OUR SHELLFISH; BRUCE STEELE, BOARD OF DIRECTORS, CALIFORNIA URCHIN DIVERS ASSOCIATION; RICHARD WILLIAMS, EXECUTIVE SECRETARY-TREASURER, SAVE OUR SHELLFISH; MS. KIT ARMSTRONG, CHAIRMAN, WESTERN OIL GAS ASSOCIATION, SEA OTTER TASK FORCE; MS. CAROL FULTON, EXECUTIVE DIRECTOR, FRIENDS OF THE SEA OTTER; AND ROBERT GILMORE, ASSOCIATE DIRECTOR, FEDERAL ASSISTANCE, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Mr. REBUCK. Mr. Chairman, I would like to thank yourself and the committee for having us here today. If there would be any specific questions that you might have on particular fishery issues, I have Mr. Bruce Steele, who represents the California Urchin Divers Association, and another associate, Mr. Richard Williams, who I would like to call upon if necessary.

SOS is pleased that once again we can represent the position of the central and southern California recreational and commercial fishermen at this hearing. For the first time, all of the various fishery interests have joined in a unified voice to express our concerns for the trend that seeks to protect one species above all others.

For over 30 years all along the central coast of California there has raged a conflict that has seen the collapse of one fishery after another, primarily due to the uncontrolled foraging of sea otters.

Recently an emergency closure to gillnet and trammelnet fishing has been imposed to reduce the accidental drowning of sea otters in nets.

Fishing concerns are that many more conflicts will result from this type of approach. This one event has been the catalyst that brings about fishing unity.

We feel that all near shore fishing activities would be in jeopardy with this type of action.

Although California State Senate bill 89 is not yet law, if implemented this law has the potential of closing not only net fishing, but crabbing and lobster fishing if only one sea otter was found to be drowned in these types of fishing devices.

In our document package you will find two letters, one from our U.S. Congressman, the Honorable Leon Panetta, stressing that these matters "appear to fall solely within the State."

A second letter from our local State Assemblyman, co-author of S.B. 89, Eric Seastrand says, "At this point I see little that can be done at the state level because of the Federal laws are protecting sea otters."

To the fishing community, these signals from our elected representatives are an indication that no one is able to deal with the situation. We need the support of our U.S. Congress to clarify the intent of the law concerning this unique situation. With all this confusion and uncertainty, the U.S. Fish and Wildlife Service has yet to clarify or offer any compromise. We feel that the situation warrants modification of the existing law and a clarification by Congress.

We feel that the subpopulation of sea otters in California and the Alaskan population are healthy and viable populations. The population in California has remained stable for over 15 years.

On the issue of the proposed translocation of sea otters to San Nicolas Island, our position is unchanged. We oppose this proposed action for several reasons. No. 1, although promised containment at this site, the Fish and Wildlife Service has yet to demonstrate any containment capability.

No. 2, admittedly in the PDEIS for translocation, 100 percent of all fisheries would be precluded within 5 years of translocation.

No. 3, San Nicolas Island is an important spawning ground for California spiny lobsters, sea urchins and abalone. The spawn is carried by currents to the mainland and to other islands throughout the entire southern California bite.

Our recommendations are:

1. To contain the parent population within the state historic California sanctuary, with buffer and vacuum zones at either side.

- No. 2 would be to explore all translocation sites identified in the Dobbins mapping study, with the addition of San Francisco Bay. We concur with the Dobbins study, which identified the Washington coast to be the most appropriate site for translocation, although the U.S. Fish and Wildlife Service has eliminated this site from discussion.

We have proposed San Francisco Bay as an alternative site and are ready to work with State and Federal agencies to guarantee a safe and healthy habitat for sea otters.

We need a new interpretation of the ESA section 10(j) that would allow for zonal management now, for we feel that the fisheries will not exist if this timetable is on the 5, 10 or 15 year schedule that has been previously proposed.

The proposed translocation cannot be undertaken with a research permit. Translocation is a management tool aimed at recovery.

We wish also to protect all the components of the marine environment. We feel that invertebrates are worthy of protection as well as the more glamorous animals at the top of the food chain.

We as fishery representatives are attempting to work within the system to guarantee that California's unique fisheries and fishermen have a future.

Under the present sea otter recovery plan, we are uncertain of our future. Many fishermen and others are preparing for a future by exploring open ocean mariculture. Ocean farming holds great

potential, but its viability rests with the proper management of all marine resources.

We have several questions that we would like to have answered maybe today if we could; No. 1 being the U.S. Fish and Wildlife Service has yet to define what is the OSP of sea otters. We would like to know what that number is and when OSP would be reached.

We would also like to know how sea otters will be contained at any translocation site.

We would like to know who is going to pay the costs on the containment of sea otters.

We would also like to know who is going to pay and for how many years.

We would also like to note that the Pacific Gas & Electric, which has powerplants at either end of the sea otter range, one at Estero Bay and one at Moss Landing in Monterey have switched over from oil to natural gas to power their plants.

So we are wondering, where is the risk now to otters?

In conclusion I want to thank you again, Mr. Chairman, for hearing our proposals today and thank you for your consideration.

[The prepared statement of Mr. Rebuck follows:]

PREPARED STATEMENT OF STEVEN REBUCK, ON BEHALF OF SAVE OUR SHELLFISH

INTRODUCTION

Save Our Shellfish (SOS) was formed in 1979. Our comments reflect the concerns of a large number of interested and affected groups with a combined constituency in the hundreds of thousands. A few directly affected are:

- Morro Bay Fishermen's Association—60 boats;
- California Gillnetters' Association—120 boats;
- Commercial Abalone Divers—179 permittees in 1984;
- Commercial Sea Urchin Divers—229 boats in 1983;
- Commercial lobster fishermen—410 permits in 1984; and
- Greater Los Angeles Council of (Sport) Divers (GLACO)—approximately 300,000 active members.

SOS also represents seafood processors; wholesalers and retailers; seafood restaurant owners and their customers; charter boat and dive shop owners and their employees; boat builders; marine and diving equipment suppliers; shellfish mariculture operators; and among others, all those who support facilities that are directly and/or unknowingly affected by the lack of proper resource management.

SUMMARY OF CONCERNS

The sea otter-shellfishery conflict has dragged on for over 25 years in California, and has surfaced more than a few times in Congressional hearings. The basic problem was that sea otters preclude human use of shellfish. Biologists now agree on this fact. The sea otter range in California extends some 219 miles along the central coast. There is no commercial and virtually no sport shellfish harvest where otters are established. Some of this area has been precluded, particularly for abalone, for over a decade. Now shellfish resources are being impacted by expansion of migrant front otters outside this range.

The issue has grown even wider, however. Under threat of lawsuit from otter protectionists, the California Attorney General issued an informal opinion that current protective laws forbid the incidental "take" of even one otter. After the "no acceptable mortality" finding, CDF&G Director Parnell closed central coast waters inside 15 fathoms to gillnets over three-inch mesh. In effect since January 25, 1985, the closure will be continued under authority of Senate Bill 89, now moving through Legislature.

CDF&G has estimated that 80 otters a year may be drowned accidentally in gillnet fishing, based on observations of 10 percent of net pulls, where 22 otters were observed drowned over a two-year period. Many of these animals were subdominant migrant front males that, according to biologists, seasonally are pushed to the periphery of the established range due to food scarcity. Gillnet fishermen have recov-

ered fish with the skins peeled off, a technique used by Alaskan otters that forage on fish, according to U.S. Fish and Wildlife Service scientist Karl Kenyon. It may be that California otters caught in gillnets were actively working the nets, looking for food. As one fisherman suggests, banning gillnets may cause a net increase in otter mortality because inshore gillnets also catch white sharks. White sharks are known to be responsible for at least 10 percent of recovered dead sea otters. According to John McCosker, director of Steinhart Aquarium and noted shark authority, the white shark population is increasing, paralleling increases in protected marine mammals. McCosker believes that some "management" plan will soon be needed to control population growth of both marine mammals and sharks. (SF Chronicle, February 18, 1985)

We all agree that sea otters need and deserve protection. But as the law is now interpreted, sea otters are to a large extent precluding multiple use of nearshore resources. There is the loss of shellfish: abalone, sea urchins, crabs, clams, mussels, and as sea otters move south, lobsters. The gillnet closure eliminates local halibut, angel shark and sea bass fisheries. Furthermore, as pending SB 89 is worded, it sets a precedent to close more areas and more fisheries as otters expand their range. And it sets precedent for other species incidentally caught in other fisheries, potentially eliminating still more fisheries.

In 1980 the Marine Mammal Commission recommended that the FWS recognize the need for zonal management, and that implementation would require designation of otter and non-otter zones. Also, implementation would require effective containment methods for zonal management to succeed. Although FWS now recognizes zonal management on paper as a possible eventuality, we still have no designated zones or proven containment methods. Nonetheless, FWS is pressing for a 1985 translocation to San Nicolas Island, which would preclude a critical shellfishing area in the Channel Islands and conceivably jeopardize all Southern California shellfishing and gillnetting.

The FWS research staff has repeatedly overlooked research contrary to its own beliefs. It has not utilized the best scientific information in choosing San Nicolas Island as its preferred translocation site.

The island has the smallest carrying capacity and largest oil spill risk of any site considered. Oil seeps reported near the island (reference BLM) in preliminary drafts of the Dobbins Mapping Project were dismissed in the final version as "unconfirmed," and "not confirmed by visual observation."

Reasonable estimates place carrying capacity for San Nicolas at 300-400 animals. The Preliminary Draft Environmental Impact Statement for translocation acknowledges that carrying capacity might be reached within eight years. (FWS plans to translocate 150-250 animals within five years.) There is no discussion in the PDEIS of dispersal, although otters at carrying capacity are known to disperse. How will these animals be contained? Who will guarantee funding in perpetuity for containment?

Scientific opinion diverges widely regarding the health and viability of the current otter herd and the otter's effect on the ecosystem. However, the FWS research staff theorize that because otters decimate kelp-grazing sea urchins, they enhance *Macrocystis* kelp (the commercially harvested species), and increased kelp fosters an increase in finfish—positive economic benefits.

Much available scientific testimony confirms the widely variable patterns in kelp communities. Southern California has a different system than central California, which is different from Alaska (where much FWS research was compiled). The point is, economic benefits, if any, have not been—and cannot be—measured because many factors besides otters influence kelp abundance in California: storms, pollution, El Niños and so on.

Biologists generally equate more kelp with more of some fish species, but not necessarily those valued by fishermen. Nobody can say if—or how many—economically important fish might be gained by increases in kelp canopy that possibly could be attributable to, among other influences, sea otter foraging. On the other hand, desirable fish like sheephead and cabezon apparently decrease in areas where otters forage, since otters remove 90 percent of the invertebrates that these species depend on.

Furthermore, Southern California has effective alternate predators on sea urchins: sheephead, spiny lobster and urchin divers who harvested over 60 million pounds of urchins in 1981-83 alone, with a multiplied value of \$47.8 million—an increasingly important U.S. export fishery. This fishery as with all shellfisheries, will be precluded where otters establish.

We're looking for reasonable solutions—agreements—whereby sea otters can be protected and people can still exist on the ocean. We agree with the concept of

translocation as a management tool, but we need guarantees protecting multiple use of resources. This can be accomplished through zonal management, but realization of that goal has been thwarted to date by many inaccuracies and discrepancies:

1. Although management is possible under an experimental population designation of the ESA, management is impossible under the MMPA as now written, due to the southern sea otter's "threatened" listing in the ESA, which automatically classifies the herd as "depleted" under the MMPA.

Thus, without MMPA amendment, FWS has no authority to translocate otters under the terms of its agreement, i.e. containment of the experimental population.

The FWS attempt to translocate under a research permit to avoid amending the MMPA is not valid, although it is one justification FWS gives for a San Nicolas translocation, deemed necessary since the Service has spent some five years and a half-million dollars for baseline research at this island.

The purpose of translocation, as MMC and FWS have stated, is to alleviate the oil spill threat, delist the population and allow zonal management. FWS overlooks excellent baseline research at Diablo Canyon, which measures changes in the environment before and after otter foraging, eliminating the need for translocation research to assess this function. Furthermore, translocation under a research permit allows FWS no authority to contain/manage sea otters.

2. The PDEIS appears to bias the reader to the urgent need of translocation, yet fails to discuss elemental recovery/zonal management issues.

(a) The PDEIS states that the otter range has not grown measurably in a decade. But according to the FWS Recovery Plan, the range has increased almost 40 miles since 1977, and increase greater than the historic average.

(b) There is no discussion of management framework within the scope of the entire species. The PDEIS declines to discuss: The specific definition of Optimum Sustainable Population; How many translocations are necessary to delist, to zonally manage; how containment/management will be accomplished (FWS assumes personnel will be able to retrieve individual animals one by one; there is no consideration that otters could disperse in groups); and who will fund management and for how long? Who will guarantee funding for containment in perpetuity?

What is the bottom line of translocation? What will it achieve? Who, ultimately, will it affect? What will it cost? These are questions currently without answers.

(c) There is no discussion of dispersal and its impact on resources, or its impact on open-ocean miraculture projects. Nor is there adequate assignments of potential containment methods and their costs. According to the Dobbins Mapping Project, if otters disperse to other Channel Islands, "conflicts arising from the selection of San Nicolas would be greater (in economic terms) than conflicts arising from dispersal from other zones."

Dispersal is a characteristic of otters at carrying capacity. Otters recolonized in Alaska—from seven widely scattered remnant groups to approximately 200,000 animals—by dispersal across broad expanses of open ocean. Dispersal was also responsible for population declines immediately following prior translocations.

At present, containment is not legal, technically possible, or feasible without amendments to allow last-resort culling.

The economics of containment and provisions for acceptable "taking" are not addressed in the PDEIS. Due to the probability of dispersal, the economic impact of translocation must consider the entire Southern California area, not just Sea Nicholas Island.

(d) The largest suitable site identified in Dobbins was eliminated from the PDEIS. The Northern Washington site has a potential carrying capacity of 1,300-2,500 sea otters. Oil risks on the outer coast is "very low" and shellfishing conflicts also are very low in the zone proper. FWS eliminated the site because of the presence of a small herd of Alaskan otters, translocated to the southern otter range in the 1960's, and the possibility of hybridizing the potentially unique gene pool of California otters.

Historically, otters ranged continuously along the Eastern Pacific Rim. The majority of scientists consider northern and southern sea otters part of the same species with no evidence of subspeciation. Preliminary research has found no measurable genetic differences between northern and southern otters. Many scientists state that interbreeding would simply restore historic continuity of the artificially disrupted gene pool.

However, FWS declined to expand genetic research, claiming genetic determination was not germane to the recovery of the southern sea otter. We believe it is when the largest and best site is precluded from consideration on the basis of politics.

RECOMMENDATIONS

1. Amend ESA Section 10(j) to require that no experimental population be established without agreement by all affected interests.

All impacts of such a translocation must be weighed fairly: Cumulative economic impacts on the entire region, not only the translocation site proper; Cumulative risks over the entire region. For instance, sea otter dispersal into areas of unacceptable risk in Southern California is a distinct probability. How will dispersal impact otters (how will it impact oil recovery)?

2. "Nonessential" status under Section 10(j) must be required and guaranteed in perpetuity prior to translocation.

3. Designate all waters south of Point Buchon as a "Non-otter zone" for the purpose of an experimental population, including all Channel Islands. Amend the ESA (and MMPA) to permit an acceptable incidental take within the non-otter zone.

4. Stipulate that one translocation will alleviate the oil spill threat and will be sufficient to delist otters from the ESA. Zonal management for the central coast population should accompany such translocation, containing otters north of Point Buchon as specified but allowing their expansion north of Santa Cruz to the mouth of San Francisco Bay.

This encourages growth of the central coast herd while protecting otters from expanding into vigorous oil recovery efforts, tanker traffic and natural seeps found around and south of Point Conception. (The Dobbins Report eliminated several areas in Southern California from consideration due to unacceptably high environmental risk, i.e., tanker traffic and oil recovery: Los Angeles, San Diego and the Northern Channel Islands.)

Such determination also establishes a guaranteed fishing zone for shellfish and gillnet fishermen, protecting mariculture development, and allowing the State to fulfill its mandate preserving a balance of all marine of all marine resources.

5. We urge that the Northern Washington site be included in the DEIS and be reconsidered as the primary site for translocation. Northern Washington has the largest carrying capacity, low fishing conflict and low oil spill risk on the other coast. If the presence of Alaskan otters constitutes an insurmountable problem, we suggest that they serve to perfect capture and containment techniques and, as part of the experiment, be relocated back to their original range.

6. Following GAO recommendations offered 1981 to the present, we urge that the MMPA be amended to clarify its intent with respect to acts mandating conservation of fisheries (Fisheries Conservation and Management Act of Fisheries Promotion Act). We also recommend amending the MMPA, through the ESA if possible, to allow acceptable incidental take and conformity with management options available under the ESA experimental population designation, "nonessential."

7. We recommend that FWS be allowed leniency in its schedule, providing time to address unresolved issues in the DEIS, time to revise the document removing bias/inconsistencies in conformance with NEPA guidelines, and time, most importantly, to allow adequate review by officials at the regional and Washington levels.

In conclusion, FWS has given us no understanding of what translocation will accomplish to alleviate this longstanding conflict. Will translocation eliminate oil risk? Delist the southern sea otter? Achieve OSP? Allow zonal management? Without resolution of these questions and ironclad guarantees of containment, we cannot support translocation.

To date the FWS research staff—a small group of people with a mission—has interpreted federal law and, in essence, decided policy. We ask Congressional guidance in defining the intent of protective legislation: What is OSP, for instance?

We seek amendments to allow greater management flexibility and a reasonable incidental take of sea otters in fishing operations. We believe these compromises are necessary if we are ever to resolve this conflict. We believe that, through zonal management, we can protect sea otters and still enjoy multiple use of the nearshore. We are willing to work toward mutual compromise if we are guaranteed that our valued fishing/mariculture grounds will be preserved for human use.

SUMMARY OF RECOMMENDATIONS

(Congressional Hearings on the Reauthorization of the MMPA March 10, 1984)

We expounded upon the threat to sea otters from over 2,000 natural oil, gas and tar seeps located south of Point Conception, south of the current sea otter range. These seeps may become dangerously active during times of high seismic activity. (State Lands Commission, "California Offshore Gas, Oil and Tar Seeps," 1977) The

area south of Point Conception should be designated a non-otter zone for the animals' protection.

We discussed the loss of an American heritage: hunting/foraging seafood along our shorelines.

We discussed the loss of commercial/recreational shellfisheries caused by uncontrolled sea otter range expansion.

We discussed the threat sea otters pose to present and future open-ocean farming.

Our recommendations to amend the MMPA were meant to facilitate, by whatever means necessary, a zonal approach to sea otter management that would realistically and reasonably resolve this longstanding conflict.

SEA URCHIN FISHERY SYNOPSIS, BY THE CALIFORNIA URCHIN DIVERS ASSOCIATION [CUDA]

(By Bruce A. Steele)

Giant red sea urchins (*Strongylocentrotus franciscanus*) were once considered pests, but a thriving fishery, developed by the National Marine Fisheries Service in the early 1970's, has mitigated the urchins' negative effects on giant kelp (*Marcocystis pyrifera*).

The sea urchin is a spiny, fast growing echinoderm that has many important roles in the Southern California reef ecology. Besides providing protection for many crustaceans and fish beneath their spine canopy, sea urchins trap drift kelp, allowing thorough spore inoculation on reef surfaces nearby. This is a critical factor in the dispersal and growth of kelp (Dayton, Tegner, 1984). Urchins also prevent matting by undesirable red algae while providing conditions conducive to the growth of encrusting coralline algae. Coralline algae are a prime factor in the recruitment of abalone larvae to the reef. The presence of encrusting red algae induce larvae to metamorphose into benthic snails. (Morse, et al, 1980). Many metamorphosed abalone spend several months of their young lives under the nursing care of adult sea urchins (personal observation; Steele).

Although sea urchins were once damagingly overpopulated, our fisheries' efforts since 1972 have resulted in vast off-shore kelp beds. Any accurate pictorial survey would prove this.

Sea otters decimate urchins to a point where the urchins' positive effects are virtually nonexistent. On the other hand, fishermen leave many smaller urchins, selectively controlling their population. This precludes damage which might occur with either urchin overpopulation or underpopulation.

Literature cited: Dayton, P.K., Tegner, M. 1984, "The Role of Sea Urchins," in Peter Price, C.N. Slobodchioff, and W.S. Gaud (eds.) "A New Ecology: Novel Approaches to Interactive Systems." Morse, D.E. et al, 1980, "Introduction of Settling and Metamorphosis of Plankton Molluscan (*Haliotis*) Larvae III." Signaling of metabolites of intact algae is dependent on contact. In D. Muller-Schwarze and R.M. Silverstein (eds.) "Chemical Signals." Plenum, NY.

Table 1 Commercial fish landings (in thousands of pounds) reported for the Santa Barbara Region 1973 - 1982

Species	1973	1974	1975	1976	1977	1978	1979	1981	1982
Sea Urchins	3,444	6,893	7,188	10,467	13,066	10,095	13,816	17,713	13,324
Mackerel	18	655	0	3,967	11,339	8,819	10,980	17,022	11,662
Anchovy	33,428	36,063	50,871	39,627	29,563	13,419	17,234	20,047	14,282
Rockfish	3,869	3,982	4,779	5,844	5,540	4,971	5,814	5,171	6,538
Albacore	3,326	1,128	1,496	1,733	1,094	3,511	1,833	2,171	320
Abalone	2,041	1,626	1,411	1,053	901	812	639	713	794
Lobster	59	47	55	81	49	165	110	118	123
Crab	297	343	709	595	508	697	629	734	813
Shark	45	70	96	242	428	795	505	673	960
Halibut	138	113	186	406	296	267	371	674	545
Sole	917	930	1,442	1,188	1,183	1,106	1,226	1,048	1,006
Shrimp	9	200	241	92	1,230	106	442	1,584	923
Squid	1,489	3,832	5,117	3,388	5,366	2,594	15,902	4,908	3,094
Salmon	328	234	156	211	195	406	101	116	210
Swordfish	95	109	95	11	73	335	60	115	198
Total	52,709	54,494	76,157	69,075	71,150	49,911	73,077	74,043	56,320

1980 data are not available. Ports include Port Hueneme, Oxnard, Ventura, Santa Barbara, Grover City, Avila, San Luis and Morro Bay.

Source: California Department of Fish and Game unpublished data for 1977-82, and published data in Fish and Game Bulletins for 1973-76.

Table 2 United States Exports to Japan -
Sea Urchin Roe

<u>Year</u>	<u>Kilograms</u>	<u>Value, US \$ CIF (air freight)</u>
1983	411,181	\$ 8,670,509
1982	497,480	9,425,529
1981	637,430	12,083,183
1980	590,282	9,992,514
1979	753,970	11,131,013
1978	485,881	6,275,745
1977	511,153	5,936,487
1976	356,659	4,043,741
1975	231,547	2,527,786
1974	N/A	N/A
1973	105,982	876,568

Source: "Japanese Imports of Marine Products"
by Japan Marine Products Importers Association
Yurakucho Building 1014
10-1, 1-chome Yurakucho, Chiyoda-ku
Tokyo

Including the years 1981, 1982 and 1983, sea urchin landings totaled 60,488,795 in Southern California, valued at \$11,631,538 ex-vessel.

Three-Year Value

\$11,631,588 ex-vessel X 1.29 (NMFS processors' margin) = \$15,004,748

\$15,004,748 X 3.19 Multiplier = \$47,865,146

The multiplied value of the Southern California sea urchin fishery totals \$47,865,146, for an average of \$15,955,048 per year.

FISHERIES PRECLUDED BY SEA OTTERS

EX-VESSEL VALUE OF AFFECTED FISHERIES* BY AREA

* Halibut, Angel Shark, Oungeness, Rock Crab,
Lobster, Abalone and Sea Urchins

Year	Eureka	SF	Monterey	Santa Barbara	L.A.	San Diego	Total
1983	\$6,931,740	\$2,002,518	\$42,948	\$5,079,868	\$2,031,477	\$1,562,565	\$17,651,116
1982	6,622,737	1,309,044	57,248	5,977,849	2,147,373	1,456,844	17,571,085
1981	8,888,995	588,558	64,947	7,384,768	2,505,799	1,382,163	20,815,226
1980	9,160,751	853,844	82,837	5,680,832	1,785,685	1,138,026	18,701,975
1979	8,149,365	895,090	48,571	4,273,999	1,897,171	1,145,992	14,103,311
1978	6,362,252	1,060,876	34,157	2,749,137	1,306,776	885,313	12,498,511

REGIONAL TOTALS

	Northern California	Monterey	Southern California
1983	\$ 8,934,258	\$42,948	\$ 8,673,910
1982	7,931,781	57,248	9,582,056
1981	9,477,553	64,947	11,272,726
1980	10,014,595	82,837	8,604,543
1979	9,044,455	48,571	5,010,285
1978	7,423,128	34,157	5,041,226

REGIONAL ECONOMIC VALUE OF SOUTHERN CALIFORNIA SHELLFISHERIES/AFFECTED FINFISHERIES

1983	\$8,673,910 x 1.29 (NMFS Processors' Margin) = \$11,199,343 x 3.19 Multiplier = \$35,694,004
1982	9,582,056 x 1.29 = 12,360,852 x 3.19 = 39,431,117
1981	11,272,726 x 1.29 = 14,541,816 x 3.19 = 46,388,393

THREE-YEAR TOTAL, COMBINED

\$121,513,514

AVERAGE REGIONAL VALUE, MULTIPLIERS ADDED

\$40,504,504

1983 LANDINGS AND EX-VESSEL VALUE BY SPECIES/AREA

<u>Species</u>	<u>Eureka</u>	<u>SF</u>	<u>Monterey</u>	<u>LA</u>	<u>SD</u>	<u>Total</u>
Hallbut	385	544,782	21,069	128,561	51,825	1,113,043
	\$ 573	725,216	33,390	229,722	93,312	\$1,138,086
Angel		1,147	248	17,502	3,644	351,344
	\$	620	182	6,443	1,437	\$ 102,874
Dungeness	4,558,192	593,251	4,905	9	60	5,180,975
	\$6,925,595	993,696	8,887	11	91	\$7,942,323
Rock Crab	4,544	27,832	164	281,747	234,377	1,335,822
	\$3,359	17,165	141	233,200	183,602	\$1,097,581
Lobster						
	\$			171,906	197,404	484,444
				665,020	730,790	\$1,835,334
Abalone (B)	38	19				
	\$			107,679	8,223	463,575
				154,853	10,263	\$ 628,224
Abalone (R)		59,239	165,429	4,777	20,539	249,984
	\$	255,974	405,490	15,392	54,843	\$ 731,699
Abalone (P)			28,135	20,323	13,222	61,680
	\$		74,199	62,526	36,595	\$ 173,320
Abalone (G)			2,255	15,270	2,423	19,948 *
	\$		6,870	47,540	8,982	\$ 63,392
Urchins **	6,912	30,256	1,195	2,905,644	1,794,242	15,808,021 **
	\$2,209	9,845	345	616,770	442,650	\$3,338,277

Compiled from 2/3/84 preliminary COF&S Statistics - Table 15

* Green abalone landings are incomplete. Table 15 shows 55,210 pounds total.

** Sea urchin poundage totals 17,267,701 pounds (Dave Parker, COF&S).

1982 LANDINGS AND EX-VESSEL VALUE BY SPECIES/AREA

<u>Species</u>	<u>Eureka</u>	<u>SF</u>	<u>Monterey</u>	<u>SB</u>	<u>LA</u>	<u>SO</u>	<u>Total</u>
Halibut	1,814 \$ 808	415,661 514,549	38,407 52,976	545,145 949,258	162,832 275,504	39,855 71,485	1,203,714 \$1,864,380
Angel	\$	675 252		312,589 104,529	3,664 1,198	1,025 326	317,953 \$ 106,305
Dunge- ness	6,100,897 \$6,606,234	481,240 637,989	2,532 3,951	6,339 5,480	854 523		6,591,862 \$7,254,177
Rock Crab	7,755 \$8,583	15,702 8,351		927,973 656,862	213,479 172,561	184,831 146,232	1,249,740 \$ 992,589
Abalone (B)	\$			443,272 567,684	160,435 223,709	8,538 12,261	612,245 \$ 803,654
Abalone (R)	\$	65,307 141,829		306,922 695,230	3,868 7,836	38,016 84,430	414,113 \$ 929,395
Abalone (P)	\$			41,069 102,607	23,620 68,376	17,872 46,136	82,561 \$ 217,119
Abalone (G)	\$			2,648 7,502	57,676 190,309	13,617 40,773	73,941 * \$ 238,584
Lobster	\$			124,502 457,044	191,432 675,689	194,183 700,048	510,117 \$1,832,781
Urchins	37,288 \$7,112	11,432 3,294	1,236 321	13,367,604 2,431,703	3,104,007 531,668	2,046,212 355,153	18,568,179 \$3,329,251

Compiled from 4/11/83 preliminary COF&G statistics - Table 15

* Green abalone landings are incomplete. Per Dave Parker, COF&G, 88,675 pounds landed total.

1981 LANDINGS AND EX-VESSEL VALUE BY SPECIES AND AREA

Species	Eureka	SF	Monterey	SB	LA	SD	Total
Hallibut	1,092	317,965	40,709	690,175	173,316	49,008	1,262,265
	\$ 1,020	338,446	48,453	1,165,341	286,832	79,654	\$ 1,919,746
Angel	\$	2,853	527	260,114	4,507	639	268,640
		717	184	86,728	1,500	239	\$ 89,368
Dungeness	10,064,879	344,336	15,614	10,504		108	10,435,441
	\$ 8,842,332	448,622	14,627	11,421		66	\$ 9,517,068
Rock Crab	2,671	10,278		718,411	380,503	263,364	1,375,227
	\$ 1,323	4,025		543,617	295,832	186,306	\$ 1,031,103
Lobster	\$			117,789	184,980	176,094	478,863
				400,458	641,328	595,584	\$ 1,637,370
Abalone (B)		606		375,249	133,759	11,334	520,948
	\$	953		497,210	201,385	14,654	\$ 714,202
Abalone (R)		54,705	736	304,680	3,319	66,875	430,315
	\$	128,548	1,658	720,922	8,136	149,920	\$ 1,009,184
Abalone (P)		12	10	45,692	34,151	14,262	94,127
	\$	32	25	109,119	82,981	31,736	\$ 223,893
Abalone (G)				2,496	45,553	14,951	63,000
	\$			7,377	129,843	37,351	\$ 174,571
Urchins	209,959	22,713		19,221,364	4,658,963	2,320,287	26,433,986
	\$ 44,320	6,378		3,842,1575	857,961	286,650	\$ 5,037,984

Compiled from 4/11/84 preliminary CDF&S statistics - Table 15

CALIFORNIA ABALONE ASSOCIATION,
Santa Barbara, CA, March 6, 1985.

Congressman JOHN BREAUX,
Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment,
Cannon House Office Building, Washington, DC.

DEAR CONGRESSMAN BREAUX: I am writing you this letter as a fisherman, wondering if there will be any fisheries left on the West Coast after the Fish and Wildlife Service (FWS) has placed sea otters throughout the California Coast. As I'm sure you are aware, there are no shellfisheries that have survived the sea otter in the past.

All we have asked is to have an otter-free zone and to be allowed to continue our livelihood. I thought that if someone understood what translocation means, that it wouldn't happen; but, it seems that the message has never been effectively communicated.

Instead, we are facing the destruction of our mariculture projects in the areas in which the sea otters are to be translocated. With the translocation of the otters to the Channel Islands area, sea otter predation is sure to devastate our mariculture projects, even before the results are in.

Perhaps, if we could expand our fishery, with the blessing of the state, to northern California and to currency unfished by potentially productive areas in which there are no sea otters, we might then be able to realize the dream of cultivating and replenishing the sea with mariculture.

As things stand now, the state prohibits our fishing in those areas; and, the federal policy protecting otters is forcing us out of business. It's that simple.

Sincerely,

WIN SWINT, *President*.

CALIFORNIA ABALONE FISHERY SYNOPSIS

(By Win Swint, President, California Abalone Association)

California abalone have been a valued resource since prehistoric times. The giant sea snails were a staple food for coastal Indians; and the shells were prized as trade items, finding their way across much of the continent. Over the last century and a half, first Chinese, then Japanese and Caucasian, fishermen harvested abalone. California's diving fishery began around 1900; from the early 1900's until the 1960's, divers landed an average four million pounds a year. Approximately two million pounds a year came from offshore reefs above Morro Bay, on the central coast, then the hub of the fishery. Today, aside from small production in Alaska (150,000 pounds/year guideline), California's commercial abalone industry remains the only one of its kind in the United States.

The return and expansion of sea otters in California have had a dramatic impact on the fishery, however. Once accounting for half or more of the statewide catch, the central coast now harbors an estimated 1,300-1,500 sea otters, whose appetites for shellfish are legendary. (An average adult consumes about 5,500 pounds of food a year—over two tons of shellfish per animal. The herd eats an estimated 8 million pounds of food a year or more.) There has been no commercial abalone harvest in the 200-mile sea otter range for over a decade; there are virtually no harvestable abalone (or any other shellfish). Sea otters have continued to expand their range—recolonizing almost 40 miles in the past 8 years—eliminating crab and Pismo clam fisheries as well as abalone.

Since the Morro Bay abalone fishery shut down in the early 1970's, statewide landings have declined from an average four million pounds to about one million, all species. (Four species of the abalone comprise the major harvest: reds, blacks, pinks and greens. A fifth species, Sorenson, is also harvested in small quantity.) Over 75 percent of all commercial abalone now come from the Channel Islands, off the southern California coast. (CDF&G statistics) During the last decade, southern California abalone supplies have declined for a number of reasons: climatic/oceanic conditions, concentrated commercial pressure and increased competition from a booming sport diving industry.

Regulations to limit entry to the commercial fishery were enacted in 1977, proposed by commercial divers themselves. About 175 permittees, many part-time, now dive commercially, governed by CDF&G restrictions, like size limits. (Commercial sizes are ¼ to 1 inch larger than sport sizes. New legislation will reduce commercial sizes and impose bag limits when the number of permittees drops to or below 100.) Today the focus of the commercial fishery is on mariculture: replacing harvested

stocks by reseeding with hatchery-spawned juvenile abalone, planting seed for the future.

The California Abalone Association, representing commercial divers, is a non-profit organization whose charter lists these goals: (1) To preserve, foster and promote the abalone industry; (2) To protect the public demand for and interest in abalone through comprehensive reseeding programs; and (3) To advocate conservation through utilization of the maximum sustainable yield of the resource. In short, CAA's purpose is to safeguard the fishery and restore the abalone resource, an historic and popular California landmark.

However, all California shellfisheries, and, most recently, inshore gillnet fisheries are jeopardized by federal laws interpreted to advocate uncontrolled expansion and unmitigated total protection of sea otters. This conflicts with, indeed runs counter to, other federal legislation (i.e., Fisheries Conservation and Management Act and American Fisheries Promotion Act which mandate conservation and utilization of fisheries). As important, such layers of otter protection preclude multiple use of the nearshore. (Multiple use of resources is another federally-mandated concept.)

Already fully protected by state law, sea otters were included in the Marine Mammal Protection Act of 1972, transferring authority to the U.S. Fish and Wildlife Service (FWS) just at a time when state officials realized the need to manage otters.

Federal protection increased in 1977 when California otters were listed as "threatened" in the Endangered Species Act. FWS declared the "southern" sea otter an isolated population threatened by potential oil spill; coincidentally, FWS received 289 letters from sea otter protectionists lobbying for an "endangered" listing. Today, state and independent sources acknowledge that the basis for the listing was political.

The listing is questionable on grounds that, taxonomically and genetically, there are no apparent measured differences between northern and southern otters. There are approximately 200,000 sea otters in Alaska. As a species, the sea otter is in no danger of becoming "endangered" or extinct.

In an informal review, after Friends of the Sea Otter threatened to sue state and federal governments, California's Attorney General found that protective laws allow absolutely no "take" of otters, except for research purposes. Until the opinion, an estimated 80 otters per year were calculated to be drowning in gill nets, incidental to inshore gillnet fishing, primarily for halibut. The A.G.'s verdict forced CDF&G Director Parnell to close the central coast from Monterey to Point Sal inside 15 fathoms to gillnets (except for three inch mesh). This preempts still more fisheries—halibut, angel shark, and white sea bass—and sets precedent for jeopardizing any fishery that accidentally kills a sea otter (or other protected species). This precedent will likely follow sea otters as they expand their range, which biologists predict may be at a rate of 10-15 miles a year.

Certainly, the sea otter should be protected, but is it the intent of federal law to preclude all shellfishing and inshore gillnetting along the coast? At the projected rate of expansion, sea otters will reach Point Conception in very few years. Viable abalone beds still exist around and below the Point, and the majority of halibut are landed south of Point Conception. Further, the northern Channel Islands would be easily accessible by sea otters once they reached Point Conception. The Channel Islands are crucial to all shellfisheries, and other fisheries, based in southern California.

The future of abalone and many other fisheries depends on decisions made for the sea otter. The FWS has proposed translocation of 30-50 otters a year for 3-5 years to San Nicolas Island, gateway to the Channel Islands.

San Nicolas represents 10-20 percent of the remaining abalone fishery, and is a breeding ground for siny lobster, another fishery unique to California. Also, San Nicolas is an increasingly important harvest ground for the sea urchin fishery, now southern California's largest shellfishery—a multi-million dollar export to Japan.

FWS has agreed in principle to contain translocated otters near the island, but there are no proven containment methods other than bodily capture of individual animals, a time-consuming and not always successful procedure.

From past translocations and recolonization of Alaska, animals dispersed, some traveling across wide expanses of ocean. Translocation not only eliminates fisheries on San Nicolas, it jeopardizes shellfisheries and inshore gillnet fisheries throughout southern California. The multiplied value of affected fisheries averages \$40 million a year.

Carrying capacity for the island is projected at 300-400 otters. It may achieve equilibrium density within eight years. Even if animals don't immediately disperse, they will emigrate to new food supplies after carrying capacity is reached. Thus

translocation to San Nicolas will require substantial containment efforts in perpetuity if animals are to be kept from recolonizing all the Channel Islands.

Along with the smallest carrying capacity, the mapping study found San Nicolas to have the highest relative oil spill risk.

If the purpose of translocation is to alleviate the perceived oil spill risk, why does FWS advocate moving sea otters into southern California, with the heaviest oil development on the entire West Coast?

In the opinion of many objective scientists, the FWS research staff has biased its findings, ignoring contrary scientific opinion, attempting to justify the "essentiality" of sea otters in the ecosystem and the need for translocation to San Nicolas Island. FWS spent close to \$500,000 on San Nicolas baseline studies before addressing elemental recovery issues, as recommended by the Marine Mammal Commission.

The EIS is supposed to be an objective analysis of the proposed action, its alternatives, and their total impact. The preliminary DEIS is a biased, incomplete document that sidesteps all the major issues.

The largest and, possibly, best translocation site, the northern Washington coast, was eliminated from discussion for political reasons: the presence of Alaskan sea otters.

The San Nicolas translocation is presented as a research exercise, after 30+ years of research already compiled. If FWS is in need of more research, why not translocate the Alaskan otters now occupying the northern Washington coast back to their original range, clearing the area for "southern" sea otters? The northern Washington coast was historically part of the southern otter range. If one accepts species separation.

The DEIS tries to quantify economic benefits of sea otters on the basis of theory—and incomplete theory at that. As many scientists point out, the southern California kelp ecosystem differs from that in other areas. Many factors influence kelp abundance, and sea urchins, major kelp grazers at times in certain areas, have other predators in southern California not found elsewhere: sheephead, spiny lobster, and urchin divers—who also restore kelp and contribute to a multi-million dollar Japanese export fishery.

The DEIS refuses to discuss Optimum Sustainable Population—how many sea otters in how many places are enough to remove the threatened listing and allow management.

The list goes on. The point is that FWS interprets protective law to benefit one species at the expense of a balanced ecosystem—and at the expense of fisheries. How far did Congress intend this protection to go?

The California Abalone Association supports the concept of zonal management, long sought by the state and recommended by the Marine Mammal Commission to solve what must be the most critical resource conflict in the history of wildlife management. We urge Congress to help us in this goal by amending or reinterpreting federal laws—the MMPA and the ESA—to allow management agencies the flexibility to control sea otters. Zones must be determined before translocation is effected; and resource managers must be granted authority to keep otters within these zones, both for their own protection and to conserve other, equally desirable, resources, including shellfish. Only through zonal management can California's abalone fishery have a future. We are on the threshold of existing breakthroughs in open-ocean mariculture. We ask simply that we be given our own protected space—and a chance.

STATEWIDE ABALONE LANDINGS

Compiled from Table 15 (CDF&G)

	<u>Pinks</u>	<u>Blacks</u>	<u>Reds</u>	<u>Greens</u>	<u>Total</u>
1979	153,117	324,791	436,138	59,885	975,931
1980	132,721	507,743	493,116	61,138	1,194,778
1981	94,192	510,346	427,735	63,930	1,096,203
1982	85,638	633,047	430,303	88,675	1,237,663
1983	61,680	463,575	249,984	55,210	830,449

SAN NICOLAS ISLAND ABALONE LANDINGS

Compiled from Block 813, 814, 858 (CDF&G Statistics)

1979	13,539 (9%)	47,232 (15%)	79,283 (18%)	(14%) 140,054
1980	13,690 (10%)	58,858 (12%)	45,221 (9%)	(10%) 117,769
1981	19,718 (21%)	14,520 (3%)	57,312 (13%)	(8%) 91,550
1982	5,491 (6%)	34,419 (5%)	39,762 (9%)	(6%) 79,672
1983	5,207 (8%)	38,304 (8%)	23,967 (10%)	(6%) 67,478

SANTA BARBARA EXVESSEL PRICES FOR ABALONE

Compiled from Table 15 (CDF&G)

	<u>Pinks</u>	<u>Blacks</u>	<u>Reds</u>
1979	\$1.59	\$.89	\$1.43
1980	2.47	1.14	1.98
1981	2.39	1.32	2.37
1982	2.50	1.28	2.23
1983	2.64	1.33	2.45

**SAN NICOLAS ISLAND ABALONE VALUES
BASED ON SANTA BARBARA AREA PRICES**

Compiled from Table 15 & Block Landings

	<u>Pinks</u>	<u>Blacks</u>	<u>Reds</u>	<u>Total</u>
1979	\$21,527	\$42,654	\$113,375	\$176,466
1980	33,814	67,098	89,537	190,450
1981	47,126	19,166	135,829	202,121
1982	13,727	44,056	88,669	146,452
1983	13,746	50,944	58,719	123,409

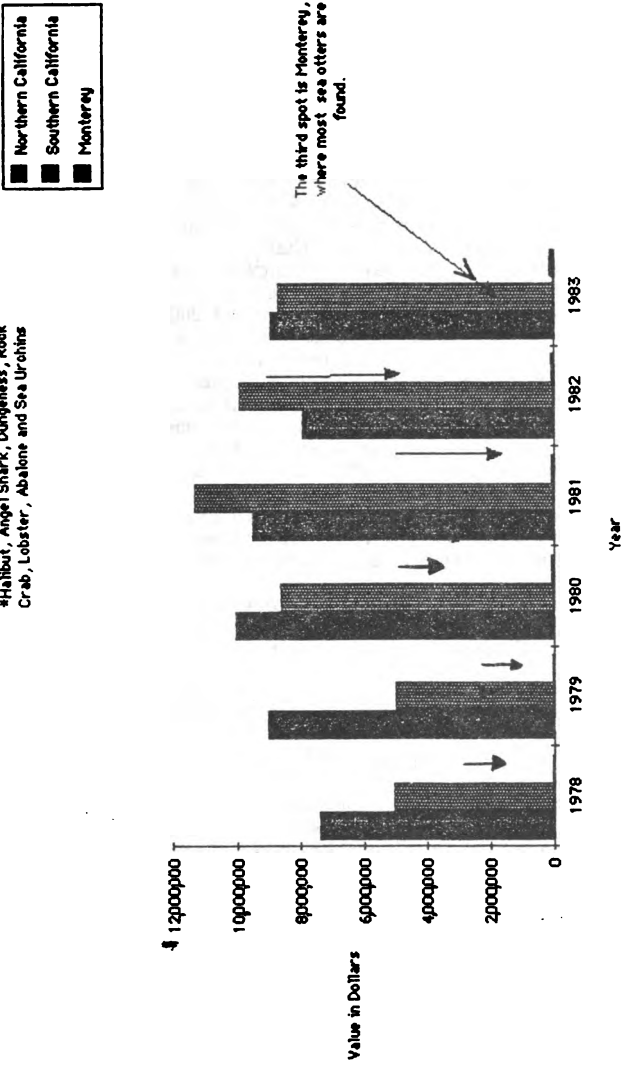
EXVESSEL VALUE OF AFFECTED FISHERIES - BY AREA

***Halibut, Angel Shark, Dungeness, Rock Crab,
Lobster, Abalone and Sea Urchins**

	<u>Northern California</u>	<u>Monterey</u>	<u>Southern California</u>
1978	\$7,423,258	\$34,1578	\$5,041,226
1979	9,044,455	48,571	5,010,285
1980	10,014,595	82,837	8,604,543
1981	9,477,553	64,947	11,272,726
1982	7,931,781	57,248	9,582,056
1983	8,934,258	42,948	8,673,910

Exvessel Value of Affected Fisheries by Area

*Halibut, Angel Shark, Dungeness, Rock
Crab, Lobster, Abalone and Sea Urchins



Compiled from Table 15--Preliminary CDFG Statistics

HON. JOHN BREAUX,
Chairman, House Subcommittee on Fisheries and Wildlife Conservation and the Environment, Washington, DC.

DEAR CONGRESSMAN BREAUX: We have an alarming situation in Central California which is the closure Commercial Gillnet fishing areas due to the impact of the sea otter.

We are an Association of 120 boats, exclusively using gillnets, and ranging from Central California to the Mexican border. Many of these boats fish inshore, from the beach out to 10 to 15 fathoms (90 ft. of water) for species such as Halibut, Barracuda, Sea Bass and Shark. These species represent over 2 million dollars annually to the fishermen and the spiral effect is 3 to 4 times that value.

The areas closed at this time, by a 120 day emergency closure by the Dept. of Fish and Game due to some Otter drownings, is the entire Otter range from Santa Cruz City to Pt. Sal, just above Pt. Conception—a total of about 200 miles and out to 15 fathoms. It is this out to 15 fathoms closure that absolutely kills the fishermen in this area, since 90% of their catch comes from inside of 10 fathoms of water. These boats are essentially out of business in the ports of San Luis Obispo (Avila), Morro Bay, Monterey, Moss Landing, and Santa Cruz. They will be out of business unless they get some relief and will be forced to leave their home port and move into the southern California area thus impacting an already sensitive area even more. In southern California there is a greater conflict with recreational sportsman who don't want to see the existing nets let alone more.

The Sea Otter and other marine mammals are becoming an issue that sportsmen are picking up and using against us. The resources are healthy so they can't use that argument of overfishing, so they are using marine mammals as their issue, and Otters fit their needs well.

The way it is moving with feelings toward the Otters, wherever the Otter ranges or someone wants to relocate them—this area then becomes off-limits to the commercial gillnet industry, for Otter supporters are contending that the two cannot co-exist.

We are looking for a containment of the Otter in its existing range so that we don't lose any more territory, and new areas of shellfish are not devastated by the Otter's eating preference.

Secondly, we need to have access into some of the existing range. I stress, some of the range, and qualify the extreme ends of the range, especially the Southern end, where the Otter seldom ranges. In these ranges, we need to have a fixed allowable mortality rate, and if it is exceeded, then the fishery should be shut down for the remainder of the year. The fishermen can avoid a colony of Otters: they know right where they are, but it seems it is the free-ranging bachelor male that occasionally may be caught from the colony or raft. Because of this bachelor male, the entire gillnet industry in this area is shut down. With a small allowable mortality rate, both the fishermen and the Otters could coexist.

Possibly an approach would be to de-list the animal, take it off the endangered list—since it isn't really that endangered. That way everyone wouldn't be so hamstrung over the mortality of one animal. I don't suggest this casually, but with great forethought. If this was the last of these animals, I would feel supportive of them, also, but with big herds of them in Alaska and Russia, I don't see any problem with re-establishing them, if necessary, within their existing range; but let's not see the entire southern section of California along with the Central area have to give way to them.

We are attempting, without much success to work within the State Legislature, to address both the Fishing Industry and the people concerned about the Otter. Probably the biggest problem is the State level passes it back to the Federal level, saying "our hands are tied, it's the Fed's ballgame". As long as Congress maintains the existing attitude of total protection toward this animal, we are not going to be able to solve our problems here on a local level and the fishermen will surely lose. Thank you.

Sincerely,

TONY WEST, Vice President.

**PORT SAN LUIS COMMERCIAL FISHERMEN'S ASSOCIATION,
Avila Beach, CA, March 8, 1985.**

HON. JOHN BREAUX,
Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, Washington, DC.

DEAR SIR: We are an association comprised of trollers, set and drift gill-netters, and crab fishermen. The members of our association fish throughout the State of California, but the majority of us concentrate our efforts off the coast of Central California near Port San Luis.

In September of 1984 the California Department of Fish and Game requested that the gill-net fishermen in this area attend meetings with the Department as well as representatives of U.S. Fish and Wildlife and other interested parties in an attempt to develop legislation to reduce the incidental take of sea otters in set gill nets.

A number of proposals were made by the gill-net industry including spot closures, a limitation on the amount and type of nets and the manner in which these nets would be used. At the last meeting in late 1984 the California Department of Fish and Game determined that the measures proposed by the net fishermen would significantly reduce the incidental take of sea otters. Representatives of U.S. Fish and Wildlife and other interested parties assured us that because of our efforts and cooperation legislation would be developed to protect the sea otter and preserve our way of life.

However, in early 1985 the California State Attorney General issued an informal, preliminary legal opinion concerning the interpretation of the Marine Mammal Protection Act. Specifically, his opinion stated that the incidental take of even one sea otter in a gill-net constituted a violation of the intent of the Act. Due to this opinion, all of the efforts mentioned earlier to deal with the incidental take of otters in gill-nets were completely disregarded.

Senate Bill 89 was subsequently introduced in February 1985, and if passed will result in the virtual elimination of the gill-net industry off the central coast.

The language of the bill is so simplistic and broad that it threatens not only gill-net fishermen, but any individual who derives a living from the sea or who merely has a recreational interest in the area. For example: Will the crab fishery be eliminated if one sea otter is caught in a crab trap? Will the crab industry be eliminated because they influence the food supply of the otter? Will all recreational and commercial boat traffic be restricted if one animal is struck by a boat?

We do not believe the intention of the Marine Mammal Act was to create a single species management policy off the central coast. Furthermore, we do not believe that the intent of Congressional response to the preservation of marine mammals was to be considered and enforced without due concern for the animals' impact upon both the fishing industry and our environment in general.

We would like to extend an invitation to all interested parties to come to the central coast and observe our activities directly. We also request that this investigation not be conducted in a vacuum. The detrimental effects of certain marine mammals upon our industry and environment have been well documented by the Department of Fish and Game.

We believe you will find us most cooperative and highly concerned about the long term consequences of mismanagement of our marine resources. Hopefully, through our mutual efforts the resources of the central California coast will be enhanced and protected for everyone.

Most respectfully,

BLADE "C" UNDERWOOD,
Chairman, Gill-net Committee.

ASSEMBLY, CALIFORNIA LEGISLATURE,
Sacramento, CA, March 8, 1985.

MR. STEVE REBUCK,
*Stearns Wharf,
Santa Barbara, CA.*

DEAR MR. REBUCK: Thank you for your recent letter in follow-up to our meeting in Sacramento. I enjoyed the chance to talk to you and others concerned about the conflicts between near-shore fishing and incidental takings of sea otters.

The decision that zero-level mortality of sea otters was the only acceptable level was one made by the state Attorney General after review of current protection afforded the sea otter by the Marine Mammal Protection Act. Changes in this protection and that given by the Endangered Species Act would have to be made by Con-

gress, not the state legislature. As long as the number of sea otters continues to decline or remain the same, I believe there is little chance to institute an acceptable level of taking. Current estimates are 1300 animals over the 200-mile range. Because of their migratory nature, it is difficult if not impossible to set aside "protection zones" as a practical solution to the conflict.

I quite agree that holding public hearings after the fishing areas were closed was not the proper way to conduct the proceedings. It made the hearing moot by having it after the fact, and I hope that this is not the way such activities will be handled in the future. Also many people were not notified or notified only a day or two before the hearing, giving them little opportunity to testify. Even though I am a co-author of SB 89, I was not notified of the hearing; my staff learned of it two days before from telephone calls from affected fishermen.

Again, I appreciate your concerns for your livelihood and the maintenance of viable commercial fishing industry along our coast. At this point I see little that can be done at the state level because of the federal laws protecting sea otters; but be assured that if any suggestions come before me that seem promising I will give them my utmost attention.

Sincerely,

ERIC SEASTRAND, *Assemblyman.*

GREATER LOS ANGELES COUNCIL OF DIVERS,
Beverly Hills, CA, March 8, 1985.

Congressman JOHN BREAUX,
Subcommittee on Fisheries, Wildlife Conservation and Environment, House of Representatives, Washington, DC.

DEAR CONGRESSMAN BREAUX: It is extremely frustrating to continually be required to write letter after letter to various governmental agencies concerning the proposed translocation of sea otters to San Nicolas Island. But this is such an important issue for the sport diver, that we must. To concede this issue is the same as signing a death certificate on the underwater resources of this island.

As pointed out in the draft environmental impact report, "it is projected that 100% of the abalone, sea urchin and spiny lobster commercial fisheries will be lost within five years after translocation begins, * * *". If the commercial fishery goes, the sport fishery goes too. If there is nothing for the professionals in their respective fields, the amateur sport diver can expect nothing as well.

San Nicolas Island is the last bastion of "virgin territory" which divers from all over these United States look forward to during the Fall months, needless to say the remainder of the year. To eliminate this area for recreational use is like surrendering Paris to the Germans in World War II. There are other areas more suitable for translocation, if necessary, areas that won't allow otters to migrate to the remaining nearby Channel Islands.

Management of this species is imperative. To allow the unbridled spread along the California coast will seriously affect the area resources. And to concentrate a herd at San Nicolas Island would be a devastating blow as pointed out earlier.

Please initiate what steps are necessary to establish a management plan for the sea otter and turn the management back to the State of California where it belongs and can best be administered.

Sincerely,

LOCKY BROWN, *Legislative Chairman.*

Mr. Bosco. Thank you very much, Mr. Rebeck. We will take all the testimony and then address questions afterward.

The next witness is Ms. Armstrong.

STATEMENT OF MS. KIT ARMSTRONG

Ms. ARMSTRONG. Mr. Chairman, thank you very much for giving us the opportunity to be here today.

My name is Kit Armstrong. I work for Chevron USA and I am here today representing the Western Oil & Gas Association, which I will refer to as WOGA.

WOGA has a number of member companies who are very active in the exploration and development of the offshore oil and gas re-

sources in California. They are very concerned about the impact the sea otter issue has had on their proposed activities and about what the future of their activities is going to be in light of concerns about the sea otter.

The companies are very interested in looking for the kinds of solutions that can best benefit both the industry as well as the need to protect the sea otter. We are committed to working through a consensus process to try to find acceptable resolutions to the issues.

Last year before this subcommittee, in the reauthorization hearings on the Marine Mammal Protection Act, WOGA testified at some length, describing the restrictions that had been imposed on the various leasing, exploration, and development activities in the offshore California waters because of concerns about the sea otter. I won't go back through any of those examples.

I would like to say that those restrictions do continue to be imposed, that we do face continued prohibitions and constraints on our projects because of concerns about the status of the sea otter; so the sea otter continues to be a major concern to our industry.

From the beginning of WOGA's involvement in the sea otter issue, we have had two primary goals. The first of those goals has been to seek the compatible development of the offshore oil and gas resources in California in a manner that will satisfy the needs to protect the sea otter.

A second goal has been to pursue understandings with the regulatory agencies and the environmental community concerning the actions that our industry would have to take in order to assure adequate protection for the sea otter and to allow that compatible oil and gas development to proceed.

As a result, for the past year we have actively participated in public discussions with a number of the interested groups involved in the sea otter controversy. The effort has been to look toward ways to develop a consensus on the resolution of many aspects of this longstanding issue.

Despite the progress we believe has been made in identifying issues and approaching some possible solutions, WOGA firmly believes that the issue is not likely to be resolved in the very near future, possibly the longer future, without some clear legislative direction from Congress at this point.

Most of WOGA's concerns stem primarily from a proposal by the Fish and Wildlife Service to translocate the population of sea otters from the existing coast of central California to San Nicolas Island in the Channel Islands off the southern California coastline.

The Service has undertaken a very commendable effort, a scoping process, to identify the issues to be addressed by the translocation proposal. The scoping process was extremely valuable, in our opinion, in bringing together a number of the interested groups to discuss issues relating to the conservation of the sea otter. The Service has recently issued a preliminary draft environmental impact statement addressing the translocation proposal. It is certainly a very important first step in evaluating the environmental and economic impacts of the proposed translocation and alternatives. It is clear that the document has a long way to go to be a complete analysis of all the issues and impacts of concern.

Based on our review of the preliminary draft environmental impact statement, we have a number of concerns with the translocation as it is presently proposed. In fact, we cannot help but view the translocation, as presently proposed, as raising the very real possibility that, instead of assisting in the resolution of the sea otter issue, it will in fact serve to widen the area of potential conflict between the protection of the sea otter and our industry's activities.

The written statement that we have provided to the subcommittee details our concerns.

I would like to summarize that part of the written statement concentrating on the particular opportunities that we see for amendments to the Endangered Species Act, particularly section 10(j), which we believe could assist in addressing the concerns that we have identified about the translocation proposal, and also assist in the broader resolution of the sea otter issue.

The most important of our concerns has to do with the establishment of experimental populations under section 10(j) of the act. It is our belief that the legislative history and congressional intent behind section 10(j) was that experimental populations would be established in accord with agreements between the Fish and Wildlife Service, affected agencies and persons holding an interest in land that could be affected by the establishment of that experimental population.

The arguments in favor of translocation largely revolve around the need for translocation in order to adequately protect sea otters from the risk of oil spills, to reduce the risk of oil spills to otters to an acceptable level.

Our industry, therefore, needs some assurances, if the translocation is to be authorized, regarding how that translocation will in fact reduce the perceived risk to the otter, and whether, in fact, additional mitigation measures would then be necessary for our industry to assure further protection of the sea otter from oil spills.

The Fish and Wildlife Service has not yet committed to enter into any agreements with affected agencies and land holding interests under the provisions of section 10(j), and agreements that would address not only the concerns about the translocation, but also the relationship of the translocation to other issues involved with protection of the sea otter.

WOGA believes that it would therefore be very beneficial to clarify section 10(j) to assure that the Fish and Wildlife Service has the clear authority to enter into those kinds of agreements to address the issues related to establishment of experimental populations, and also to confirm the congressional intent that we understand was present in the 1982 amendments, that the Service would, in fact, pursue those kinds of agreements in the course of establishing experimental populations.

A further issue is that the Fish and Wildlife Service has also not yet committed that it will do any translocation using the procedural mechanisms and safeguards of section 10(j).

Again, we believe that the 1982 amendments expressed the clear legislative intent that section 10(j) would be the mechanism by which experimental populations would be established, at least experimental populations of the type being considered for the sea

otter translocation. Therefore, we would recommend that section 10(j) be clarified to reaffirm that congressional intent to use section 10(j) for experimental populations such as that being proposed for the sea otter.

A third item of concern relates to the fact that the Fish and Wildlife Service has not indicated whether it would designate any translocated population of sea otters as essential or nonessential, if the translocation is done under the authority of 10(j).

We again view the legislative history of the 1982 amendments as expressing a clear congressional expectation that, in all but the most unusual circumstances, experimental populations would be designated nonessential.

Therefore, we would recommend that section 10(j) be clarified to confirm that congressional intent, to provide that, except in very unusual circumstances, experimental populations would be designated nonessential and that the provisions of sections 7 and 9 would not apply to populations within the area that has been designated for that experimental population.

In the case of a translocation specifically to San Nicolas Island, we have some concerns about the operation of section 10(j) even in the event the Service were to designate the experimental population as nonessential. If otters were to stray from the San Nicolas Island and cross over into the boundaries of the Channel Islands National Park, section 10(j), as it is written now, would appear to require that otters designated nonessential on one side of the park boundary and not intended by the Fish and Wildlife Service to be, in the National Park, once crossed over that boundary would become an essential population. Having that essential population in an area of the Santa Barbara Channel very near some of the most active existing and proposed oil and gas development could result in some very significant restrictions on our activities in the area.

For those reasons, we would recommend that section 10(j) be modified to clarify that, under conditions such as those that are likely to be involved in the translocation of otters to San Nicolas Island, the experimental population retain its nonessential characterization throughout the area that is designated for the experimental population.

A major issue relates to the ability to contain otters once they are translocated. The Fish and Wildlife Service needs, in our opinion, to commit adequate technical and financial resources to assure containment of otters at the translocation site.

Again, we view section 10(j) as an appropriate vehicle for the Fish and Wildlife Service to develop agreements that will assure such things as containment, and believe that section 10(j) can be modified to assist that process.

A final concern is that the Marine Mammal Protection Act prohibition on taking of depleted species, in our opinion, leaves the Service without adequate legal authority to translocate and to contain sea otters at a translocation site over the long term.

We believe that legislative amendments will be necessary and appropriate to assure that the Fish and Wildlife Service has adequate legal authority to translocate, and more important, to contain over the long term.

In conclusion, WOGA believes that substantial progress has been made over the last year to identify issues and some possible solutions to those issues involved in the sea otter controversy. However we do believe that additional legislative clarifications are necessary and desirable to address the concerns that we have identified and to assure that the Service has adequate authority to address those concerns as they proceed with its activities. These legislative clarifications are going to be essential, in our opinion, if the Service is going to be able to resolve this conflict.

We reiterate that of particular importance is that the Service has the adequate authority and the incentive, with clear direction from Congress, to enter into the appropriate agreements and assurances that are envisioned by section 10(j) to assure that it can address the concerns that we and others have about the proposed translocation and its relationship to the protection of the sea otter population.

That is the conclusion of my statement. Thank you very much again for the opportunity to present it.

[The prepared statement of Ms. Armstrong follows:]

PREPARED STATEMENT OF MS. KIT ARMSTRONG ON BEHALF OF WESTERN OIL AND GAS ASSOCIATION

1. INTRODUCTION

The Western Oil and Gas Association (WOGA) is pleased to submit the following statement regarding the reauthorization of the Endangered Species Act of 1973. WOGA is a trade association representing companies that produce, refine, transport, and market petroleum and petroleum products in the western United States. Our testimony focuses on the relationship between the development of the oil and gas resources offshore California and the conservation of the California Sea Otter.

A year ago we appeared before this Subcommittee during the hearing on the reauthorization of the Marine Mammal Protection Act regarding the sea otter issue. We testified at length about restrictions imposed on the leasing, exploration and development of nationally significant oil and gas resources as a result of public concerns about the status of the sea otter. Such restrictions continue to be imposed. Just within the last few weeks, the California Coastal Commission rejected an exploration plan within the OCS Lease Sale No. 73 area. It appears that this decision was based, in part, on the status of the sea otter under the Endangered Species Act.

At the suggestion of this Committee, for the last year we have participated in public discussions with the environmental community, the fishing industry, the Fish and Wildlife Service, and other regulatory agencies regarding the possible solutions to several significant sea otter issues. Although progress has been made in the last year to develop a consensus regarding these solutions, it is clear to WOGA that the sea otter issue is unlikely to be resolved in the near future without further Congressional direction.

From the beginning, WOGA's goal in this matter has been the development of the energy resources in the water offshore of the State of California in a manner compatible with the protection of the sea otter. From the beginning we have also sought an understanding with the regulatory agencies and the environmental community regarding what measures will be required of the oil and gas industry to provide such protection for the sea otter. We remain committed to those goals.

2. THE STATUS OF EFFORTS TO RESOLVE THE SEA OTTER ISSUE

We wish to commend the efforts the Fish and Wildlife Service has made over the last year in conducting a scoping process under the National Environmental Policy Act (NEPA) to focus on the Service's proposal to establish a translocated population of sea otters at a site on the West Coast. The scoping process has been extremely valuable in bringing together representatives of regulatory agencies, the fishing community, environmental groups and the oil and gas industry to discuss issues related to the conservation of the sea otter.

Within the last month the Service has circulated a Preliminary Draft Environmental Impact Statement (PDEIS) regarding the translocation proposal. The PDEIS contains some important new information regarding the status of the sea otter and the translocation issue. However, it is clear to WOGA that considerable additional effort will be necessary before the document adequately discusses the environmental and economic effects associated with the translocation proposal and the alternatives to translocation. We appreciate that the PDEIS is only a preliminary document and does not express an official position of the Fish and Wildlife Service. Nonetheless, we firmly believe that, without additional legislative direction from Congress, the establishment of a translocated population as presently proposed will only worsen the conflicts generated by the sea otter issue and will not lead to a resolution of the issue. Further, the translocation as presently proposed may well result in significant new restrictions on oil and gas leasing, exploration and development activities.

3. WOGA CONCERNS WITH TRANSLOCATION PROPOSAL

Our major concerns with the translocation proposal, as it has been described in the PDEIS, can be summarized as follows:

(a) It has been argued that the establishment of a translocation population is necessary to reduce the risk to the sea otter from a catastrophic oil spill to an acceptable level. We have disagreed with the Service's evaluation of the extent of any risk to the sea otter population from oil and gas related activities. Nevertheless, if any translocation is to be authorized, it is critically important to WOGA that the Fish and Wildlife Service and other regulatory agencies clearly specify what additional mitigation measures, if any, will be required for offshore oil development and what other actions will be instituted to protect the sea otter. Otherwise, the translocation will only serve to broaden the area of potential conflict between oil and gas development and the sea otter without providing any legal assurances that compatible oil development along the California coast will be able to proceed. We believe that section 10(j) of the 1982 Amendments to the Endangered Species Act (ESA) and the implementing regulations require the Fish and Wildlife Service to provide such legal assurances in an agreement with affected agency and landholding interests. To date, however, the Service has not committed to develop such an agreement with affected interests regarding any translocation and other important management issues involving the sea otter.

(b) The legislative history of Section 10(j) of the Act demonstrates that Congress intended the Fish and Wildlife Service to use the procedural mechanisms and safeguards under Section 10(j) to establish experimental populations under Section 10(j) to establish experimental populations such as that proposed for sea otters. However, the Service has not committed that it will use the Section 10(j) process for any sea otter translocation. We suggest that the intent of Section 10(j) be clarified by specifying that an experimental population will be established in the wild outside the existing range of the species only under the provisions of Section 10(j).

(c) The Fish and Wildlife Service has also not indicated whether it intends to designate any translocated population as "non-essential" under Section 10(j) of the ESA (thereby exempting that population from the provisions of Section 7 of the Act). This is despite what WOGA believes was clear legislative direction in the legislative history of the 1982 amendments that, except in unusual circumstances, translocated populations will be designated non-essential. We believe that the provisions of Section 10(j) should be clarified to assure that, except in extremely rare situations, experimental populations will only be established outside of the existing range of the species if the Secretary can determine that the population is "non-essential" and that Section 7 and 9 will not apply within any portion of the area designated for the experimental population.

(d) The PDEIS contains a preliminary draft of the proposed regulation to govern a sea otter translocation. It suggests that the Fish and Wildlife Service may decide to designate any sea otters found within the 20 fathom contour of the Santa Barbara Channel Islands as an experimental population under Section 10(j) of the ESA. Even if the Service designates the population as "non-essential", however, Section 10(j) as presently written would appear to require that Section 7 of the ESA continue to apply to any translocated animals that might stray into the Channel Islands National Park. This would effectively negate the purposes of the non-essential designation and could result in significant restrictions on leasing, exploration and development activities in the Santa Barbara Channel. Section 10(j) of the ESA should be modified to make it clear that any non-essential experimental population retains that status throughout the designated experimental population area.

(e) All parties to the sea otter controversy have agreed that containment of sea otters to any translocation site is a critical issue. Dispersal of otters from the translocation site will vastly increase the adverse impacts of the translocation. WOGA does not believe that the Fish and Wildlife Service has adequately demonstrated that the containment of a translocated sea otter population to the translocation site is technically feasible. Before any translocation is authorized, it is essential that the Service commit the technical and financial resources necessary to assure such containment. Again, we believe that the 1982 amendments contemplated that the Service would make such commitments through agreements with affected agencies and landholding interests.

(f) WOGA believes that the Fish and Wildlife Service's translocation proposal is fundamentally flawed because the Service does not have the legal authority to translocate and contain sea otters under Marine Mammal Protection Act (MMPA). The MMPA prohibits the "taking" of sea otters except for research purposes. The PDEIS therefore attempts to justify the translocation as a "research action" under the MMPA. It is clear to us that the translocation and containment of sea otters is primarily a recovery and management program and does not qualify as "research" under the MMPA. We are very concerned that the courts would ultimately prohibit the Service from containing the population to the translocation site unless the Service's authority in this regard is clarified.

(g) In a letter to the Chairman of this Subcommittee, dated May 9, 1984, the Fish and Wildlife Service identified the schedule it proposed to follow to prepare an EIS and associated regulations for the proposed translocation. WOGA believes that progress is now being made to resolve critical issues surrounding the proposed translocation and conservation of the sea otter generally. However, we believe that the Service's proposed schedule does not allow adequate time for the Service and other interested parties to reach the agreements needed to resolve the issue, or to complete the EIS and related documents and procedures, on a schedule compatible with development of those critically important agreements. WOGA would like to see, and will actively contribute to, an expeditious resolution of the sea otter issue. We believe that an appropriately extended, and thus more realistic, schedule for completion of the EIS related regulatory activities would be extremely helpful in this regard.

4. CONCLUSION

In conclusion, WOGA believes that considerable progress has been made over the last year to identify approaches to resolving the long-standing sea otter controversy. Nevertheless, it is evident to us that, without additional legislative clarification of the Service's authority to address the concerns discussed above, it is very unlikely that the Service will be successful in its efforts to resolve the conflict between various interest groups involved in the sea otter issue.

We believe that appropriate agreements and assurance to address concerns about any translocation and its relationship to protection of the existing sea otter population will be of critical importance in resolving the sea otter issue. We, therefore, particularly recommend that Congress amend the ESA to clarify that experimental populations can only be established in accordance with agreements with agency and landholding interests that will be affected by such populations, and that the Secretary has the authority to include in such agreements understandings and assurances regarding the management of the species.

Mr. Bosco. Thank you, Ms. Armstrong.

The next witness is Ms. Carol Fulton, the executive director of Friends of the Sea Otter.

STATEMENT OF MS. CAROL FULTON

Ms. FULTON. Friends of the Sea Otter appreciates the opportunity to testify here today on behalf of its 4,700 members nationwide who focus on protecting the California sea otter and its marine habitat. We strongly support re-authorization of the Endangered Species Act with increased funding to ensure no delays in needed listings and aggressive and prompt recovery actions for species that have already been listed.



We are going to focus today on the California sea otter, a species now known to be in far greater jeopardy than when first listed as threatened back in 1977.

In the past year we have gained an even better understanding of our inability to protect sea otters from oil spills.

In the past year we have also seen the Secretary of Interior award leases for offshore oil exploration as far north as Morro Bay, deep within the southern portion of the sea otter range.

However, one area of important progress should be noted. On January 21, 1985, the California Department of Fish and Game enacted an emergency ban on all large mesh entangling fishing nets set in waters less than 90-feet deep throughout the otter range, because during the past decade over 1,000 California sea otters are estimated to have drowned in these nets.

Urgency legislation to make the net prohibitions permanent has been introduced and is now moving through the state legislature. The firm bipartisan support it has received from coastal legislators and others statewide is most encouraging.

However, we are all well aware that entanglement mortality was not even recognized at the time of the sea otters' listing in 1977. It was the small size and range of the population, thought to be 1,800 to 2,000 animals at that time, and expected to increase at 5-percent annually, in combination with the offshore tanker threat that put sea otters on the threatened list. Today the population is estimated to be only about 1,400 animals. It is still menaced by tanker traffic. We now have offshore oil activities proceeding toward the southern portion of the otter range. In truth, the most optimistic remark we can make today is that stopping the net drownings may have brought us back to square one in the sea otter recovery effort. If there is truly any chance of recovering the California sea otter, we can only now begin to take steps forward. At the very least we would hope that with the net restrictions in place, the probable population decline we have witnessed will be reversed and the California sea otter will be spared reclassification from threatened to endangered.

To turn to the oilspill risk, two alarming incidents in the past year have underscored the otters' vulnerability.

On April 19, 1984, the Navy tanker *Sealift Pacific* lost power 12 miles off the coast and drifted to within 1½ miles of shore in the middle of the State sea otter refuge just north of Point Sur. That tanker was carrying 143,000 barrels of diesel fuel, a volume greater than the entire amount of oil lost in the Santa Barbara spill of 1969. Had the tanker not finally been able to find solid footing for its anchor, she would have broken up on the rocky shore, triggering the single greatest catastrophe to the California sea otter population since its near extinction during the fur trade. No Coast Guard vessel, no commercial tug could have reached her in time to prevent a disaster.

On October 31, 1984, the tanker *SS Puerto Rican* exploded 10 miles west of San Francisco's Golden Gate Bridge. The resulting spill brought additional evidence of our inability to adequately contain or clean up an open ocean oilspill. State of the art technology was unable to keep oil from slopping ashore 140 miles north of the spill site. NOAA's oilspill trajectory model predicted that the oil

would go south, and it did for a day or two; but then it reversed itself by 180 degrees and overnight, not even in 24 hours, overnight that spill moved 20 miles. Had it gone as far south as it went to the north, it would have entered the northern half of the sea otter range.

Clearly, if the California sea otter population is to have any real protection from tanker spills, serious efforts must be made to keep the big ships further offshore along the Central California coast, not only to lessen the chance of groundings, but to allow more response time in the event of an emergency. Thus, we have asked the Fish and Wildlife Service to initiate formal section 7 consultation with the Coast Guard in regards to establishing vessel traffic lanes along the coast. Unfortunately the way the tanker lanes have initially been proposed would in some cases actually bring tankers closer to shore than they now travel. Furthermore, a commercial tug capable of assisting a large vessel in distress should be stationed within the otter range, providing additional protection not only for the otters but for all the other sensitive central coast marine resources.

Those two near misses also demonstrate the urgent need to get on with the establishment of at least one additional breeding colony of southern sea otters in an area unlikely to be impacted by any spill which could hit the existing parent population. Progress on this issue has been encouraging during the past year, but it now appears increasingly unlikely that the Service can meet its target date of September/October 1985 to begin moving animals and actual translocation may still be at least another 1½ years away.

We are well aware of the various opinions on the Service's legal authority under the Endangered Species and Marine Mammal Protections Act to translocate otters, and then once translocated, to contain them at the translocation site. We are not prepared today to propose or support any specific amendment to the Endangered Species Act to facilitate translocation, and in fact we are still not convinced that one is needed. Our silence on amendments that have been proposed today should not be construed as agreement. We have major problems with many of them. We also have substantive disagreements with the Service's preliminary draft rule on the status of the experimental population. For example, we think there needs to be more emphasis on research, a stronger commitment to containment and, above all, that the colony, if established under section 10j, should be designated essential. In making that determination of essentiality, the Secretary should consider whether the loss of the experimental population would be likely to appreciably reduce the likelihood of the survival of the species in the wild. An experimental population of southern sea otters would clearly meet such a standard, for the Service has determined that the parent population has not grown in number for over a decade and may have declined. In fact, the 1,400 California sea otters estimated to exist today represent only 70 percent of the 1,800 to 2,000 animals thought to exist when they were first listed. We have already mentioned examples of the oil spill risk from tankers and offshore oil drilling. In fact, the otter population is in far greater jeopardy today than it was in 1977.

Moreover, we fail to understand how the Service could correctly conclude that the southern sea otter population could not sustain the continuing losses in the fishing nets, yet then suggest that the loss of a similar number of animals taken to establish an experimental population would not appreciably reduce the likelihood of the survival of the species in the wild. For the risk to the parent population of removing animals for translocation is acceptable only because those animals would still be alive, and they and their offspring could be used to replenish the parent population should it sustain catastrophic losses in the future.

In summary, establishment of at least one additional reserve breeding colony of southern sea otters has been identified by both the Service and the U.S. Marine Mammal Commission as a critical step toward recovering and thus delisting the population. We must remember that in the Commission's December 2, 1980, letter recommending recognition of the ultimate need for zonal management pursuant to which the sea otter would be restored to additional sites within its former range, the Commission went on to identify the sea otter zones as areas that will be secure from threats. We fail to see how denying a translocated colony the protections of section 7 consultation would meet that criteria. We understand the legitimate concerns of the oil and gas industry and the shellfish industry, that the presence of sea otters who have dispersed from the translocation site could restrict their activities. However, in conjunction with the commitment to contain otters at San Nicolas Island, we believe language could be developed to insure industry that any restrictions resulting from section 7 consultation would only apply to the animals when at the translocation site at San Nicolas Island and, of course, within the existing sea otter population range.

The decision to contain otters at San Nicolas already represents a significant concession to the oil and shellfish industries. To further deny those animals the section 7 safeguards would defeat the purposes of translocation.

I have a few points I would like to respond to that were made earlier, if I could have that opportunity later on. That concludes my presentation for now.

[The prepared statement of Carol Fulton follows:]

PREPARED STATEMENT OF CAROL FULTON, EXECUTIVE DIRECTOR OF FRIENDS OF THE SEA OTTER

Friends of the Sea Otter appreciates the opportunity to testify here today on behalf of its 4,700 members nationwide who are keenly concerned with the protection of the California sea otter and its marine habitat. We strongly support reauthorization of the Endangered Species Act with increased funding to insure that necessary listings are not delayed, and that once listed, species receive truly meaningful protection and aggressive recovery efforts.

We will focus our comments on the Southern Sea Otter, a species now known to be in far greater jeopardy than was recognized at the time of its initial listing as threatened back in 1977.

In the year since we last testified before you in support of reauthorization of the Marine Mammal Protection Act, we have gained an even better understanding of our inability to protect sea otters from oil spills. We have also seen the Secretary of Interior award leases for offshore oil exploration as far north as Morro Bay—deep within the southern portion of the otter range. (Attachment 1)

However before focusing on the continuing and increasing oil spill threat to the otters, one area of apparent progress should be noted.

On January 21, 1985, the California Department of Fish & Game enacted an emergency ban on all large mesh entangling fishing nets set in waters less than 90 feet deep throughout the otter range (Attachment 2). During the past decade, over 1,000 California sea otters are estimated to have drowned in these nets (Attachment 3). Urgency legislation to make the net prohibitions permanent has been introduced and is now moving through the state legislature with the strong support of the Department of Fish & Game, the State Attorney General and the U.S. Fish & Wildlife Service (Attachments 4, 5, 6). While the legislation has not yet been finally enacted, the firm bi-partisan support it has received from coastal legislators and others statewide is most encouraging.

However, we are all well aware that the entanglement mortality had not been recognized at the time of the otter's listing as threatened. It was the small size and range of the population (estimated to be 1,800-2,000 animals to increase at 5% annually) and the offshore tanker threat that put the otters on the threatened list. Today, with a population estimated to number only 1,400 animals still menaced by tanker traffic and now vulnerable to offshore oil activities, the most optimistic comment we can make is that stopping the net downings may have brought us back to square one in the sea otter recovery effort. If there truly is a chance of recovering the California sea otter population, we can only now begin to take meaningful steps towards that goal. At the very least we would hope the probable population decline will be reversed and thus reclassification to endangered will not be necessary. (Attachment 7)

Recently, two alarming incidents have underscored the daily vulnerability of California's sea otter population to a catastrophic oil spill:

On April 19, 1984, the Navy contract tanker *Sealift Pacific* lost power 12 miles off the coast and drifted to within one-and-a-half miles of shore in the middle of the Sea Otter Refuge just north of Point Sur. The *Sealift Pacific* carried 143,000 barrels of diesel fuel—a volume greater than the entire amount of oil lost in the Santa Barbara blowout of 1969. Had the tanker not finally been able to find solid footing for her anchor, she would have broken up on rocky shore, triggering the single greatest catastrophe to the California sea otter population since its near extinction during the fur trade. No Coast Guard vessel or commercial tug could have reached here in time to prevent a disaster. (Attachment 8)

On October 31, 1984, the tanker *SS Puerto Rican* exploded 10 miles west of San Francisco's Golden Gate Bridge. The resulting spill brought additional evidence of our inability to adequately contain or clean up an open ocean oil spill. State-of-the-art technology was unable to keep oil from slopping ashore 140 miles from the spill site. NOAA's oil spill trajectory model predicted the oil would go south. It did—at first. But then it reversed itself by 180° and moved 20 miles to the north overnight. Had it gone as far south as it went north, it would have entered the northern half of the sea otter range. (Attachments 9, 10)

Clearly, if the California sea otter population is to have any real protection from tanker spills, serious efforts must be made to keep the big ships further offshore along the central California coast—not only to lessen the chance of groundings, but to allow more response time in case of an emergency. Thus we have asked the U.S. Fish and Wildlife Service to initiate formal Section 7 consultation with the Coast Guard in regards to establishing vessel traffic lanes along the coast—traffic lanes which as initially proposed could actually, in some instances, bring tankers closer to shore than they now travel. Furthermore, a commercial tug capable of assisting a large vessel in distress should be stationed within the sea otter range, thus providing additional protection not only for the otters but for all the other sensitive central coast marine resources.

Those two near-misses also demonstrate the urgent need to get on with the establishment of at least one additional breeding colony of southern sea otters in an area unlikely to be impacted by any spill which could hit the existing otter range. While progress on this issue during the past year was initially encouraging, it now appears increasingly unlikely that the Service can meet its target date of September/October 1985 to begin moving animals, thus actual translocation may still be another year-and-a-half away.

We continue to favor San Nicolas Island for the first southern sea otter translocation site (Attachment 11).

We are well aware of the various opinions on the Service's legal authority under the Endangered Species and Marine Mammal Protection Acts to translocate otters, and then once translocated, to contain them at the translocation site. We are not prepared today to propose or support any specific amendment to the Endangered Species Act to facilitate translocation, and in fact we are still not convinced that such an amendment is necessary. We have some substantive disagreements with the

Service's Preliminary Draft Rule on the Status of the Experimental Population. For example, we think there has to be more emphasis on research, a stronger commitment to containment and, above all, that the colony, if established under Section 10(j), should be designated essential. One provision in the Preliminary Draft Rule may offer interesting options.

The proposed rule states that animals who migrate away from San Nicolas Island will be either returned to the Island or taken back to the parent population. Otters that move to other areas within the Channel Islands could be given a different designation to allow for containment. This secondary designation could be described as part of the "experimental population geographic area" and might require a more limited application of Section 7.

We wish to reaffirm our position that any consideration of translocation as a step towards possible zonal management should be consistent with the Marine Mammal Commission's letter of 2 December 1980 (Attachment 12). We further hope that today's hearing may serve as a catalyst for more productive discussions among all parties as to how we can satisfactorily resolve this issue.

Supreme Court Decision Allows Offshore Oil Leasing Deep Within Otter Range

Interior Secretary Clark Moves
Quickly to Lease Sensitive Area

Carol Fulton

The United States Supreme Court's January 11, 1984 decision sent shock waves reverberating along the coast of California. The Court overturned an earlier appeals court ruling that former Interior Secretary James Watt had violated the law in Lease Sale 53 when he leased tracts off the central California coast to the oil industry over the objections of the State. The justices concluded that the Coastal Zone Management Act (which requires federal agencies to insure that activities "directly affecting the coastal zone" are consistent with states' efforts to protect their coastlines) does not apply to oil and gas leases on the Outer Continental Shelf. This far-reaching decision could also pre-empt state participation in decisions over deep sea strip mining and hazardous waste disposal off their shores.

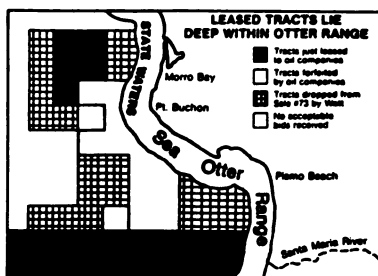
A *Santa Barbara News Press* editorial epitomized local response: "At issue in the case of offshore energy development is whether the definition of 'activity' applies as early as the lease-sale stage, or not until later, during exploration and production stages. Everyone, even the court majority, agrees that once huge sums of money have been invested in lease rights, exploration and production are practically foregone results. The effectiveness of reviewing a project's individual and cumulative environmental effects at that point is greatly diminished... (yet the majority opinion) nevertheless argued that the coastal management act permits states to intervene in federal offshore 'activities' only after the lease-sale stage, when the momentum for development has been established. This draws an excessively narrow and illogical conclusion... and it mocks this nation's serious commitment to balancing energy needs with protection of natural resources."

Reeling in disbelief, legislators from both Pacific and Atlantic coast states immediately introduced corrective legislation in the House and Senate in an attempt to insure that the Court will not again misinterpret the intention of Congress that offshore oil leasing should indeed fall within the states' consistency review authority. But as the bills began to wind their tortuous way through the hearing rooms on Capitol Hill, the Department of Interior moved quickly on the California coast.

As soon as all legal constraints were removed, recently appointed Interior Secretary William Clark announced that 17 leases covering the Sale #53 tracts released by the Court's decision were ready for signing. Clark had chosen to ignore the pleas of local governments, elected officials and environmental organizations that he return the bids on these tracts — tracts even closer to shore than those previously dropped from Lease Sale #73 by former Secretary James Watt because they posed too great a threat to "important coastal beaches, the habitat of the sea otter and other marine mammals, and important commercial fishing grounds." Had Clark had his way, tracts ranging from Pismo Beach to Morro Bay — an area which in recent years has contained up to 25% of the sea otter population, and which contains the southernmost mother/pup nursery area — would have been leased to the oil companies.

But more bombshells were to come. On May 14, Arco announced it was forfeiting its bids on 7 offshore oil tracts immediately bordering on the sea otter range. Although in their official press release they couldn't resist taking a swipe at "burdensome environmental regulations," Arco stated that a re-evaluation of the tracts had indicated they were

THE OTTER RAFT — SUMMER 1984



"less attractive economically than other projects to which our exploration funds are being directed." Translation — not enough valuable oil there to make it worthwhile. Chevron followed this unprecedented action with its own announcement it was withdrawing from 3 of the tracts, Gulf and Conoco then dropped 2 more.

Unfortunately, however, a quick calculation will reveal that there are still five tracts which were in fact leased to Amintol USA, Inc., Elf Aquitaine, and Diamond Shamrock. Five tracts directly off Morro Bay. The five tracts which lie deepest within the sea otter range — between 6 and 15 miles offshore, stretching south for 9 miles off Pt. Buchon.

But there was one bright spot in the Supreme Court decision — a clear affirmation that before proceeding to the exploration stage, the oil companies will be required to obtain additional federal permits that will be subject to consistency review by the California Coastal Commission. The Commission has previously determined that oil development in this area would produce an unacceptable risk to the sea otter population. Thus the battle will continue, on a tract by tract basis, and we will continue our work to insure that the Supreme Court decision — a dark milestone on the sea otter's road back from extinction — will be offset by the bright beacon of hope held aloft by the California Coastal Commission.

Oiled Otter Dead on Big Sur Coast

"The adult female was found on 5 December approximately 3 kilometers north of Point Sierra Nevada. The otter was taken to Pt. Piedras Blancas for further examination. The carcass was in good condition with the exception of the pelage which was matted with oil. A total of 35 patches of tarry oil was found on the carcass: 20 on the dorsal surface and 15 on the ventral surface. Patches of oil ranged in size from 1.5-6.5 centimeters and were distributed from the head and neck to the base of the tail. There was no other sign of external trauma.

"Examination of the gut revealed that it was empty. No food or oil residue was found in the entire tract. Some subcutaneous fat was found in the abdominal region, and the mammary tissue was well developed. The uterus was enlarged and stretched thin, vulva distended, indicating that the female had recently pupped.

"Although it is impossible to say that oiling was the cause of death, it is certainly a possibility since the animal appeared to be in good condition otherwise. It should also be noted that on Arroyo Hondo Beach, which was surveyed just prior to the area where the otter was found, 3 out of 4 marine birds found were oiled, and many patches of oil were found distributed over the entire length of the beach."

(The above account was excerpted from the monthly report for December, 1983, entitled "Trial Systematic Salvage of Beach Cast Sea Otter Carcasses in the Central Part of the Sea Otter Range in Central California," prepared by Gwen L. Jameson for the U.S. Marine Mammal Commission.)

FOR FILING ADMINISTRATIVE REGULATIONS
WITH THE OFFICE OF ADMINISTRATIVE LAW

Attachment 2

RECEIVED
JAN 25 10 17 AM '85
OFFICE OF
ADMINISTRATIVE LAW

1. ATTACHED ARE REGULATIONS ADOPTED,
AMENDED OR REPEALED BY:

DEPARTMENT OF FISH AND GAME
(AGENCY)

BY: [Signature] Director
(AGENCY OFFICER AUTHORIZED TO SUBMIT REGULATIONS)

LEAVE BLANK

LEAVE BLANK

AGENCY CONTACT PERSON AND POSITION

TELEPHONE

2. Indicate California Administrative Code Title and specify sections to be amended, adopted, and/or repealed:

SECTIONS AMENDED

Title: 14

SECTIONS ADOPTED

174.5

SECTIONS REPEALED

3. TYPE OF ORDER (CHECK ONE)

☐ Regular☒ Emergency
(Attach Finding of Emergency)☐ Certificate of Compliance

Other Regulatory Actions:

☐ Procedural and Organizational
Change☐ Editorial Correction☐ Authority and Reference
Citation Change

4. IS THIS ORDER A RESUBMITTAL OF A PREVIOUSLY DISAPPROVED OR WITHDRAWN REGULATION?

☒ No☐ Yes, if yes give date of previous filing

5. IS THIS FILING A RESULT OF THE AGENCY'S REVIEW OF EXISTING REGULATIONS?

☒ No☐ Yes6. IF THESE REGULATIONS REQUIRED PRIOR REVIEW AND APPROVAL BY ANY OF THE FOLLOWING AGENCIES,
CHECK THE APPROPRIATE BOX OR BOXES.☐ State Fire Marshal
(Attach Approval)☐ Building Standards Comm.
(Attach Approval)☐ Fair Political Practices Comm.
(Include FPPC Approval Stamp)☐ Department of Finance
(Attach STD. Form 388)7a. FILING DATE OF NOTICE IN CALIFORNIA
ADMINISTRATIVE NOTICE REGISTER

7b. DATE OF ADOPTION OF REGULATIONS

January 23, 1985

7c. DATE OF AVAILABILITY OF REPEALED
REGULATIONS (GOV. CODE SEC. 11346.2(b))

N/A

8. WAS THIS REGULATORY ACTION SCHEDULED ON YOUR AGENCY RULEMAKING CALENDAR?

☒ No☐ Yes9. EFFECTIVE DATE OF REGULATORY CHANGES: (SEE GOVERNMENT CODE SECTION 11346.2 AND INSTRUCTIONS
ON REVERSE)a. ☐ Effective 30th day after filing with the Secretary of State.b. ☐ Effective on _____ as required by statute: (list)c. ☐ Effective on filing (Designate effective date earlier than 30 days after filing with the Secretary
of State pursuant to Government Code Section 11346.2(d).)☒ Request Attachedd. ☐ Effective on _____ (Designate effective date later than 30 days after filing with the Secretary of
State.)

Section 174.5, Title 14, CAC, is added to read:

174.5. Gill Nets and Trammel Nets - Areas with Restricted Fishing.

(a) Gill nets and trammel nets shall not be used in waters 15 fathoms or less in depth at mean lower low water, in District 18 between a line extending due west magnetic from Yankee Point (Monterey County) and a line extending due west magnetic from the Santa Maria River (San Luis Obispo County).

(b) The provisions of this section shall not apply to any gill net with meshes 3-inches or less in length.

Authority: Section 8664.6, Fish and Game Code.

.Reference: Sections 3005, 4500, 4700 and 10500(a), Fish and Game Code.

STATEMENT OF FACTS REGARDING THE NEED FOR EMERGENCY ACTION

The southern sea otter is classified as a "Fully Protected Mammal" under state law (Section 4700, Fish and Game Code), and a "threatened" species under the federal Endangered Species Act (ESA). In addition, sea otters are fully protected under the provisions of the federal Marine Mammal Protection Act (MMPA) of 1972. Under both federal acts and state law, it is unlawful to "take" any sea otters except for purposes of scientific research.

Based on a Department of Fish and Game monitoring program of gill and trammel net fishing operations in the area between Monterey Bay and Port San Luis (San Luis Obispo County), the Department estimated that approximately 80 sea otters per year (June 1982-June 1984) were accidentally entangled and drowned in gill and trammel nets used to take California halibut. It appears that this level of accidental take could be the most significant mortality factor contributing to the apparent lack of sea otter population growth in California waters during the past decade.

A recent informal opinion from the Attorney General's Office states that the Department has a legal mandate to take whatever actions may be necessary to eliminate the accidental take of sea otters in gill and trammel nets in view of unequivocal statutory and regulatory (both state and federal) prohibitions. The Attorney General's opinion concludes that the standard of "irreparable injury", contained in Section 8664.6 of the Fish and Game Code, is satisfied by a documentation or finding of sea otter mortality, as a direct result of gill and trammel net fishing activity based on Section 4700, Fish and Game Code.

Currently, there is a bill (SB89 - Maddy) before the State Legislature which would prohibit the use of gill and trammel nets in waters less than 15 fathoms in depth, from Waddell Creek, Santa Cruz County, to Point Sal, Santa Barbara County. Although the bill has an emergency provision, it is not expected to be in place before March 1, 1985.

Thus, in the interim, the only alternative available to immediately eliminate the accidental take of sea otters in gill and trammel nets, is to enact emergency regulations pursuant to the Director's authority as provided in Section 8664.6 of the Fish and Game Code. The Department of Fish and Game has determined that this emergency regulation is necessary for the immediate conservation, preservation or protection of birds, mammals, reptiles, or fish, including, but not limited to, any nests or eggs thereof.

SUPPLEMENT 3



California Department of Fish & Game photo

How Many More Sea Otters Must Die in Fishing Nets Before We Stop the Drownings?

Carol Fulton

The California sea otter is a "Threatened Species" protected by the federal Endangered Species and Marine Mammal Protection Acts, as well as the State of California's "Fully Protected Mammal" classification.

But although it has been more than two years since sea otters were first confirmed drowning in entangling fishing nets set in nearshore shallow waters, the animals still have no protection from the nets at all except within the 15-fathom (90-foot) depth curve in Monterey Bay. (See page 4)

Today, otters continue to drown off San Simeon, Cayucos, Morro Bay, Avila and Shell Beach, while net boats are moving ever deeper into the heart of the otter's habitat along the Big Sur Coast.

The time is long past due for a ban on all entangling fishing nets within the 15-fathom depth curve throughout the otter range — a ban which should be enacted immediately.

BACKGROUND

In 1977, the U.S. Fish & Wildlife Service designated the California sea otter a "Threatened Species," largely because its small population size and restricted range made it extremely vulnerable to an oil tanker spill. At that time its population was estimated to be between 1800 and 2000 animals, and expected to steadily increase in number and distribution.

Today, however, the Service estimates there are only 1300 independent otters surviving primarily within an established range of roughly 200 miles off the central California coastal counties of Santa Cruz, Monterey and San Luis Obispo. There has been no population growth for over a decade (in fact the population may now actually be declining) and no significant range expansion since 1977. Recorded annual mortality has more than doubled since the 1970's — drowning in fishing nets, shootings and increasing pollution of coastal waters appear to be taking a severe toll of this small population.

Although drowning in fishing nets was not officially documented until June, 1982, by late 1983 the U.S. Marine Mammal Commission was stating, "Failure to accurately determine the number of otters being caught and killed in nets and failure to prevent or significantly reduce such taking could very well result in a decline which would jeopardize the continued existence of the population and make it more vulnerable to impact from oil spills or other threats." The Commission further recommended, "There is no question that the population should not be removed from the

endangered species list. If the Service fails to reduce substantially or eliminate the incidental kill, serious consideration should be given to changing the status from "threatened" to "endangered." In April, 1984, the U.S. Fish & Wildlife Service acknowledged, "If there is any indication of further increased threats, decreased numbers or reduced reproduction, a change of status to "endangered" should be immediately considered."

THE PROBLEM

The sea otters are drowning in large mesh nets, set primarily for halibut in nearshore shallow waters. Anchored to the bottom, the nets are attached to floats which hold them upward in the water column like curtains, where they ensnare unsuspecting diving birds and marine mammals. It makes no difference if they are made of monofilament or multifilament, or are gill or trammel nets. The otters drown in them all. Whether stretched like webs across sandy bottoms just beyond the surfline, or encircling the otters' favorite kelp bed resting and feeding areas, the nets pose a lethal threat to these animals (as well as to harbor porpoises, harbor seals, sea lions, elephant seals and even, in some cases, gray whales).

No one knows the total number of otters that have died in these nets, but conservative estimates range from 60 animals per year in periods of low fishing effort to well over 100 per year during times of heavy fishing activity.

The California Department of Fish & Game has reported, "Drowning is virtually impossible to detect with certainty during necropsy even on fresh carcasses. However, the indirect and direct evidence of drownings in set nets . . . have all indicated that the potential is great for this to be a significant source of mortality." Department observers have confirmed that drowned otters initially sink when dumped overboard, and that although there is a strong correlation between the number of decomposed otters recovered on beaches near areas of intensive halibut fishing, most of the animals drowned in fishing nets never wash up on shore. When taken in conjunction with the fact that the number of nets set far exceeds those monitored by official observers, the unwillingness of fishermen to voluntarily report otters drowned in their nets, the refusal of many fishermen to pull their nets when observers are present and the deliberate attempts of some fishermen to dispose of any evidence of having drowned an otter, it becomes clear that actual documented otter drownings represent but a mere fraction of the total number of animals dying in this manner.

THE OTTER RAFT — WINTER, 1984/1985

THE SOLUTION

The Monterey Bay Experience

The loss of over 17,000 seabirds in a single summer led to the June, 1982 enactment of state legislation prohibiting entangling fishing nets within the 10-fathom depth curve of Monterey Bay. Many had wanted to ban the nets throughout the entire bay, but wildlife conservation groups agreed to try the 10-fathom compromise in hopes of obtaining satisfactory protection for marine birds and mammals with the least impact necessary on the fisheries. After the law passed, at-sea monitoring revealed not only that otters were still drowning in the nets, but that inadvertently the nets had been concentrated in the worst possible place for the animals — along the 10-fathom contour where the otters themselves were concentrated. Subsequent legislation enacted in June, 1984 prohibited the nets within the Bay's 15-fathom depth curve, and monitoring to date indicates the closure may now be adequate — no additional otters have been observed drowned.

The Rest of the Range

California sea otters generally do not dive deeper than 20 fathoms (120 feet) when searching for food. Therefore the U.S. Marine Mammal Commission has recommended that one of the steps the Service should take to "either prohibit or significantly reduce such incidental taking" within the otter range is to "assess the potential effectiveness of prohibiting gill and trammel net fishing in waters less than 20 fathoms deep."

However, in light of the encouraging initial results of the 15-fathom closure in Monterey Bay, wildlife conservation organizations are again willing to accept a compromise solution: limiting the net prohibition to only 15 fathoms — not 20 — throughout the balance of the sea otter range, while continuing careful monitoring to insure that the closure is sufficient to stop the drownings.

WHAT ABOUT THE FISHERMEN?

No one is accusing the fishermen of deliberately drowning sea otters. But even accidentally killing this threatened species is illegal under both state and federal law. Thus the California Department of Fish & Game and U.S. Fish & Wildlife Service are clearly negligent in allowing these nets to continue to be set in the nearshore shallow waters of the otter range.

Attachment 3 (cont.)

Responsible fishing organizations recognize that in areas where certain fishing methods pose an unwarranted threat to non-target species — birds, mammals or other fish — restrictions on those fishing methods are fair and necessary. They also recognize that if entangling fishing nets are not prohibited in areas where they have been shown to pose a high risk to other marine life, the resulting backlash of public opinion could result in increased support for statewide prohibitions on this method of fishing. Thus the legislation restricting the nets in Monterey Bay and off portions of the North Coast was co-sponsored by the Pacific Coast Federation of Fishermen's Associations and supported by the California Gillnetter's Association.

Moreover, the wildlife conservation groups have repeatedly demonstrated good-faith efforts to find a solution to this problem by working with the fishing community in a cooperative rather than confrontational manner.

Although on more than 20 separate occasions official observers have watched while the bodies of sea otters were removed from fishing nets — both the boats and fishermen themselves clearly identifiable — up to now we have consistently recommended that fishermen who accidentally drown otters in legally set nets not be prosecuted. We sought restrictions on nets in areas of proven high risk to marine birds and mammals rather than prosecutions of individual fishermen.

But two years is too long to wait, for the California sea otter population cannot sustain the degree of mortality now being inflicted by these nets. For a population which has never produced a count of over 1200 adults in the past 5 years, and which hasn't grown in number for well over a decade, such losses are devastating and must be remedied immediately.

THE TIME HAS COME

Thus not only must the California Department of Fish & Game now draft urgency legislation to go into effect at the earliest possible date in 1985, but the Department and the U.S. Fish & Wildlife Service must take emergency action to remove the nets from within the 15-fathom depth curve throughout the otter range right now.

The problem has been well documented. The solution is clear. If they continue to allow fishing activities likely to result in the deaths of additional sea otters, the agencies themselves will be in violation of both the Endangered Species and Marine Mammal Protection Acts.

The following remarks were made by the California Department of Fish & Game's Chief of Marine Resources, Al Petrovich, at Friends of the Sea Otter's October 6, 1984 Annual Meeting.

"Data compiled by both the Department of Fish and Game and the U.S. Fish and Wildlife Service indicates that there has been essentially no growth in the sea otter population since the mid-1970's. Prior to that time, the annual rate of population growth (increase) was estimated at 5% per year. If we use this 5% annual growth figure, along with our gill and trammel net-related mortality estimate for calendar year 1983 (74 animals), we can make gill and trammel net-related mortality estimates for previous years, based on the gill and trammel net fishing effort during those years. The mortality estimates generated using this technique, when applied to the population estimates from our past census work, demonstrate that the lack of growth in the sea otter population since the mid-1970's, closely correlates with the cumulative gill and trammel net-related mortality estimates.

ROUGH ESTIMATES OF INCIDENTAL TAKE OF SEA OTTERS IN SET NETS CALCULATED FROM ESTIMATES OF 1973-1983 SET NET EFFORT

Year	Number of Landings of Set Net Boats Within Otter Range	Estimated Mortality Based on 1983 Rate of Known Drownings
1973	457	49
1974	645	69
1976	980	105
1977	963	71
1978	874	93
1979	1449	154
1980	1407	150
1981	1578	168
1982	1057	113
1983	686	74

Attachment 4

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE



1515 K STREET, SUITE 511
SACRAMENTO 95814
(916) 443-9335

February 8, 1985

Honorable Ken Maddy
Senator, Fourteenth District
Room 5087, State Capitol
Sacramento, CA 95814

Dear Senator Maddy:

SB 89 - SEA OTTERS

The Attorney General supports Senate Bill 89.

Under existing law, the Department of Fish and Game may close certain waters to all net fishing only if it finds irreparable injury or threat of viability to seabirds, marine mammals, or fish (Fish and Game Code sec. 8664.6). This threshold finding is inconsistent with federal law which has already designated the southern sea otter as a threatened species under the Endangered Species Act (16 U.S.C. Sec. 1531, et seq.) and prohibits any taking of the animal except for scientific purposes (Marine Mammal Protection Act; 16 U.S.C. Sec. 1371, et seq.).

The Department of Fish and Game estimates that approximately 100 sea otters a year (out of a total population of 1,200) are drowned as a result of gill net fishing. California's failure to prevent needless destruction of a unique and endangered animal is not only a tragic waste of a priceless natural resource, but subjects the State itself to both litigation (see Palilia v. Hawaii Dept. of Land & Natural Resources (9th Cir. 1981) 639 f. 2d 495) and potential loss of federal funding.

SB 89 gives the Director of Fish and Game additional authority to act. Please see the attached memorandum for a more detailed discussion of the issues involved. If we can be of further assistance in supporting the measure, please let me know.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

AILEEN SUMNER
Senior Assistant Attorney General
(916) 324-5477

AS:hf

Attach.

Attachment 5

Letter sent from Ray Arnett,
 Assistant Secretary for Fish and
 Wildlife and Parks, U.S. Department
 of Interior, to Gordon Van Vleck,
 California Secretary of Resources,
 re: SEA OTTERS DROWNING IN FISHING NETS

JAN 02 1985

Mr. Gordon K. Van Vleck
 Secretary for Resources
 California Resources Agency
 1416 9th Street, Suite 1311
 Sacramento, California 95814

Dear Mr. Van Vleck:

The southern sea otter, found only in California at this time, has been designated under the Federal Endangered Species Act as a threatened species since 1977. The primary reason for listing the sea otter was evidence indicating that a major oil spill, if one were to occur in sea otter range, would cause a potentially devastating decline in the sea otter population because of their high vulnerability to oil spills. At the time of its listing as threatened, the species inhabited less than 10 percent of its historical range. The status of the population has not significantly improved since 1977. We estimate that there are approximately 1,400 sea otters off the California coast.

Since its initial listing, a new, more direct mortality factor has emerged which appears to be significantly impacting the species--accidental entanglement and drowning in gill and trammel fishing nets (incidental take). The possible significance of the entanglement mortality factor was first noted in 1982. At that time, the Fish and Wildlife Service (FWS), Marine Mammal Commission (MMC), and California Department of Fish and Game (CDFG) instituted a program to assess and monitor the incidental take of sea otters in fishing nets to better determine its magnitude, distribution, and seasonality. By the summer of 1984, enough data had been accumulated to conclude that the problem is significant, and in September a preliminary report was made public by CDFG which provided documentation of the extent of the mortality.

The CDFG report indicates that 5 to 10 percent of the population is being killed each year in fishing nets. This rate of loss is cause for grave concern since it is of such a magnitude that the likelihood of recovery is very low as long as it continues. In fact, this source of mortality is believed to be causing a slow decline in this threatened population. If this problem persists, it is possible that a reanalysis of the species' status could result in a reclassification to endangered.

JWS/OES

Both the Endangered Species Act and Marine Mammal Protection Act (MMPA) prohibit the taking of southern sea otters. Because the southern sea otter is considered to be depleted under the MMPA, any incidental taking of this species cannot be permitted. Thus, it is incumbent upon the FWS and, as provided through our Endangered Species Act (Section 6) cooperative agreement, the CDFG to take actions as expeditiously as possible to stop incidental take of otters. Pursuant to this end, the FWS is assisting CDFG in its effort to develop effective legislation to control gill and trammel net fishing in a manner that will eliminate this mortality. However, it is our understanding that the legislation is not likely to be implemented before about June 1985 at the earliest. At the present rate of losses, some 40-50 additional sea otters (3-4 percent of the population) will likely be drowned as a result of entanglement between now and next June.

We recognize that CDFG, working with the fishermen within the otter's range, is making a good faith effort to develop effective legislation. Because of the critical nature of this issue, we encourage you to seek introduction of State urgency legislation at the earliest possible time which will effectively eliminate this source of mortality. It appears to be advisable that this legislation incorporate evaluation and monitoring components which will help determine the adequacy of the legislation and provide flexibility to make modifications in the future if necessary. The FWS will continue to assist the State in its effort to develop an adequate legislative package that, hopefully, can be introduced this month.

However, if it should appear that enactment of legislation is uncertain or is likely to be delayed, CDFG should consider utilizing its existing authority to put a stop to entanglement taking. It is our understanding that the California Attorney General's Office is currently examining this question, particularly with regard to emergency closures of certain areas to gill and trammel net fishing. The FWS is available to meet and discuss this and other possible approaches with CDFG. Interim measures should not, however, be viewed as a substitute for effective long-term legislation.

In addition to legislative and regulatory measures, the FWS invites CDFG to participate in a joint information and education effort to advise fishermen and others about the illegal nature of incidental taking of otters in fishing nets and provide recommendations for reducing the possibility of catching otters in a net, such as fishing outside the 15-fathom depth contour, and background information describing why restrictions on fishing are needed to eliminate incidental entanglement.

Gordon, I know you share our concern about the seriousness of the incidental taking problem and will continue to work with the FWS to develop effective solutions. It is our sincere desire that together we resolve this issue and ensure that we meet our respective legal mandates.

Thank you for your attention to this important resource conservation matter. The Fish and Wildlife Service and I are ready to work closely with you and CDFG to develop solutions to control this problem.

Sincerely,

(Sgd) J. Craig Pottas



G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks

Enclosure

cc: Secretary's Reading File (2)

FW

FWS/OES

FWS/AFA

FWS/DD Chron

FWS/Directorate Reading File

FWS/Region 1:JRBlum:RHKoenings:mbn:11/27/84:343-4646

FWS/GES:rewritten per Gilmore:JEdmundson:lp#6:m-vleck.je:12/19/84:235-2760



United States
Department of the Interior

Fish and Wildlife Service

Lloyd 500 Building, Suite 1092
500 N.E. Multnomah Street
Portland, Oregon 97232

In Reply Refer To: APA-SE Your Reference

January 16, 1985

Jack C. Parnell, Director
Department of Fish and Game
1416 Ninth Street
Sacramento, California 95814

Dear Mr. Parnell:

This letter represents the U.S. Fish and Wildlife Service's (Service) views on the possible emergency closure of gill and trammel set net fishing to protect the sea otter. We have received notification that a proposed closure will be considered at a public hearing on January 17, 1985, in San Luis Obispo. I request this letter be entered into the public hearing record and considered in your decision on implementing an emergency closure. The FWS has a great interest in the southern sea otter since it is listed as a "threatened" population under the Federal Endangered Species Act and is also protected as a depleted species under the Federal Marine Mammal Protection Act.

The position of the FWS and Department of Interior was expressed in a January 2, 1985, letter sent from Assistant Secretary for Fish and Wildlife and Parks Ray Arnett to California Secretary of Resources Gordon Van Vleet. That letter identified the very serious problem of sea otter drownings in gill and trammel set nets as the probable cause of the slow decline in the sea otter population over the past 10-15 years. It pointed out that the current impact of this incidental, unintentional mortality is removal of 5-10 percent of the southern sea otter population each year. We predict that, based on data collected by the Department of Fish and Game in cooperation with the Service and the Marine Mammal Commission, that some 40-50 additional sea otters are likely to die in fishing nets between now and next June if no specific actions, such as an emergency closure or enactment of permanent legislation, are taken to prevent additional losses. Assistant Secretary Arnett encouraged Secretary Van Vleet to seek early introduction of urgency legislation to effectively eliminate this source of mortality, but, if it appears that legislation is uncertain or is likely to be delayed, Arnett urged the Director of the Department of Fish and Game to consider using his existing authority to stop entanglement taking. You are now at the point of considering using your emergency closure authority to curtail any further losses of this species.

Director, California Department of Fish and Game
Page two

The near-shore halibut fishery is certainly an important industry to the State of California and to those coastal communities and residents that derive a portion of their livelihood from gill and trammel net fishing. Likewise, the sea otter is an important component of the marine ecosystem--a species fully protected by two Federal laws and by State law and one that provides enjoyment to thousands of people who visit the coast. The sea otter was historically many times more abundant along California's coastline than it is today. In fact, its present day numbers are believed to be only 10-15 percent of the historic size of the population.

In the long term, equitable solutions should be developed which would be implemented over a period of time to lessen the economic impact on those who depend on the near-shore gill and trammel net fishery between the Santa Maria River on the south to Point Ano Nuevo on the north. Perhaps solutions could include certain mitigation features such as low or zero interest loans or other compensation to convert to other types of gear or development and testing of new techniques for catching halibut and starry flounder. However, it has become apparent that neither the State nor Federal laws afford us the latitude of phasing in a solution. To protect fishermen from accidentally entangling otters and, thereby becoming subjects to substantial penalties and forfeiture of expensive gear, the best short-term solution is to close the areas to fishing where there is a likelihood that a sea otter may be caught in a net. Obviously, for the protection of the sea otter itself, a total closure affords the greatest insurance against entanglement mortality. Alternatives to a total closure may be available to ensure that otters are not caught in fishing nets, while allowing some level of fishing to continue and, if so, these should be considered; however, we are not aware of any that would be effective in the short-term. In the long-term, it may be possible to develop such alternatives as previously alluded to.

To summarize, the Service views the entanglement of sea otters in fishing nets as a critical problem of national concern. The entanglement loss of otters is the principal cause of a downward trend over the past 10-15 years, the extent of the problem has now been documented, and as high as 10 percent of the entire population dies each year as a result of drowning in gill and trammel nets. At the current level of drownings, some 40-50 additional otters of all age and sex classes are expected to be entangled over the next 5 or 6 months unless measures are taken immediately to prevent it. If the problem is not dealt with quickly and effectively, there is a substantial likelihood that a reclassification to "endangered" status under the Endangered Species Act will be necessary. Any closure should be combined with an effective law enforcement effort

Director, California Department of Fish and Game
Page three

to ensure that the closure is adhered to and a monitoring effort to determine the effectiveness of such closure. In view of the current loss rates and the resultant decline in the southern sea otter population, the Service believes that an emergency closure followed by rapid enactment and implementation of permanent legislation are necessary to avoid further damage to the viability of the population. The Service is prepared to assist the State in these actions through additional law enforcement and public information activities.

I appreciate your responsiveness to this serious conservation problem, and the Service will assist your Department in carrying out effective solutions.

Sincerely yours,



Richard J. Smith
Regional Director



Attachment 7

Photo by Rick Kvitek

Southern Sea Otter to Remain Listed as "THREATENED" but...

"If there is any indication of further increased threats, decreased numbers, or reduced reproduction, a change of status to 'endangered' should be immediately considered."

U.S. Fish & Wildlife Service, April 9, 1984

Carol Fulton

On May 24, 1984, J. Craig Potter, Acting Assistant Secretary for Fish and Wildlife and Parks, certified the Department of Interior's concurrence with the U.S. Fish & Wildlife Service's Finding on Friends of the Sea Otter's Petition to Reclassify the California sea otter from Threatened to Endangered. Although in June, 1983 the Service had initially found that our Petition presented substantial information indicating that reclassification to "Endangered" may be warranted, its final decision reads as follows:

"The petition points out that the southern sea otter, which was classified as threatened in 1977, has deteriorated in status and is now in danger of extinction. The threat of an oil spill from a tanker, cited as the main problem in the original listing, continues and has been demonstrated by near disasters. Other problems, not mentioned or not considered substantial in the original listing, have developed. Intensive exploration and leasing for offshore oil production have taken place. Direct, malicious killing of sea otters by people is now thought to be a significant cause of mortality. Incidental drowning of sea otters in fishing nets appears to be a growing threat. The species may also be jeopardized by pollution from toxic trace metals, synthetic organic compounds, and raw sewage. Moreover, new evidence indicates that the sea otter population is considerably smaller than thought in 1977, that it is not increasing as was believed at that time, and that it may be declining.

"The Service has reviewed this petition and other available information. Because the danger of extinction does not appear to be immediate, and because a recovery plan for the southern sea otter is currently being implemented, the Service does not believe an endangered classification is warranted at this time."

The Service's decision on our Petition coincided with the completion of their 5-year Review of the Status of the Southern Sea Otter as required under the Endangered Species Act. In an April 16, 1984 memorandum William F. Shaks, the Assistant Regional Director for Federal Assistance stated: "The classification as threatened is appropriate because we are contemplating an active recovery program. However, the situation could deteriorate rapidly if the recovery effort is delayed or if the adverse impact of individual factors increases. Therefore, we feel we must carefully assess the status of the sea otter annually."

A 36-page Assessment¹ of the otter's status, prepared by the Sacramento Endangered Species Office, incorporated discussion of FSO's Petition to Reclassify as "Endangered," as well as analysis of the Petition to Delist the otter submitted by Save Our Shellfish, the Pacific Legal Foundation and the Greater Los Angeles Council of Divers. The Assessment concluded:

"Based on findings pursuant to Section 4(b) (3) (B) and Section 4(c) (2) (B) of the Endangered Species Act of 1973 (as amended), the U.S. Fish and Wildlife Service (hereinafter the Service) has determined that the southern sea otter (*Enhydra lutris nereis*) is appropriately classified as a threatened population. The principal threats to the sea otter population are potential contamination of individuals and/or habitat by accidental oil spills, increase in toxic pollutants within the sea otter range, and intentional shooting and incidental take in gill and trammel nets..."

"Threatened" still seems to be the appropriate classification because the population does not appear to be immediately threatened with extinction, and major action on a recovery program is expected in the immediate future. Rather than reviewing the status of the species only at 5-year intervals as required by statute, the species and the recovery effort should be closely monitored and a formal assessment made annually. If there is any indication of further increased threats, decreased numbers, or reduced reproduction, a change of status to "endangered" should be immediately considered."

The Service's findings closely paralleled those of the U.S. Marine Mammal Commission, which were summarized in a December 15, 1983 letter from the Commission's Executive Director, John Twiss:

"(1) we are now dealing with a population that apparently has not increased in more than a decade; (2) the rate of range expansion which was about five percent through the 1960's appears to have stopped; (3) the possibility of a serious impact on the otters and on their habitat and the elements of their food chain through oil transportation and exploitation remains; and (4) the incidental net kill is probably having a serious impact on the otter population. In this connection to date, steps to reduce or eliminate this incidental kill have been very limited.

"There is clearly no question that the population should not be removed from the endangered species list. If the Service fails to reduce substantially or eliminate the incidental kill, serious consideration should be given to changing the status from 'threatened' to 'endangered.' Further, the Commission believes that whatever determination is made with respect to the status, the status should remain under continuous review because of the incidental kill problem and the projected increases in offshore oil activity. To this end, the Commission recommends that the status be re-examined in late 1984."

Our Response

Friends of the Sea Otter is disappointed but not surprised at the U.S. Fish & Wildlife Service's decision not to reclassify the California sea otter as an Endangered Species, for we

THE OTTER RAFT — SUMMER 1984

had feared that political considerations would take precedence over available scientific evidence. However, we are pleased that the Service has now committed to reviewing the otter's status annually instead of every 5 years, and has clearly acknowledged the need for an Endangered classification should recovery efforts be delayed, the population's condition further deteriorate or existing threats increase.

We note, in that regard, that the Service has placed great faith in the adequacy of existing regulatory mechanisms: "The sea otter receives protection under State of California law, the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). There is no legal taking of the species, except for limited short-term handling for research. Federal agencies are required by Section 7 of the ESA to assure that none of their activities further jeopardize the otter or its habitat. The ESA also allows for citizens' suits against federal agencies should they fail to comply with ESA. State law allows for further regulation of net fisheries if they are deemed to be a threat to sea otter survival. There are still shortfalls in actual implementation of regulatory measures, but adequate measures are in place in both state and federal law."

We don't argue that the sea otter has plenty of protection on paper. But the ESA hasn't prevented offshore oil leasing and exploration from encroaching upon the otter range. There hasn't been a conviction for killing an otter for over a decade, yet the shootings continue. It has been 2 years since otters were confirmed drowning in nearshore fishing nets, yet the majority of the otter range is still unrestricted — the partial closure in effect in Monterey Bay has not stopped the drownings. Translocation to establish a reserve breeding colony — the key element in the Southern Sea Otter Recovery Plan — is still far from reality. (Ironically, should those who failed in their attempts to delist the otters succeed in their continuing efforts to needlessly delay translocation, their actions may be a major factor in a future Service decision to reclassify the otters as Endangered.)

Thus, while regulatory mechanisms and a recovery plan may exist on paper, the time is long past due for the U.S. Fish & Wildlife Service and the California Department of Fish & Game to put some teeth in them.

"April 8, 1984 Memorandum from Sacramento Office of Endangered Species to Portland Regional Office on "Assessment of Significant Points of Concern Relative to the Southern Sea Otter (SSO) 5 Year Review, the Friends of the Sea Otter Petition to Reclassify the SSO as Endangered, and the Save Our Shellfish, Greater Los Angeles Council of Divers, and Pacific Legal Foundation Joint Petition to Delist the SSO."

U.S. Fish & Wildlife Service Denies Petition to Delist the Otters

On May 4, 1984, the U.S. Fish & Wildlife Service rejected the Petition to Delist the Southern Sea Otter which had been submitted to the Service on February 4, 1984 by the Pacific Legal Foundation, Save Our Shellfish and the Greater Los Angeles Council of Divers. The Service's Finding reads:

"We find that this petition does not present substantial information in support of the requested action. The two main points of the petition are that the southern sea otter is not a separate subspecies and that it is not threatened by a potential oil spill. The first point has been repeatedly brought up during the past decade, is not supported by the preponderance of available evidence, and, in any case, is irrelevant to the question of whether the involved population warrants listing. The second point is contrary to the views of Service authorities on the sea otter and to information in the Southern Sea Otter Recovery Plan, and, in any case, the threat of an oil spill is only one of several factors jeopardizing the involved population..."

THE OTTER RAFT — SUMMER 1984

OTTER COUNTS STILL LOW

Aerial surveys, supplemented with ground-truth stations, conducted by the California Department of Fish & Game:

	<u>Independents</u>	<u>Pups</u>	<u>Total Count</u>
Spring 1975	1,357	85	1,442
Spring 1979	1,119	83	1,202
Spring 1984	1,151	52	1,203

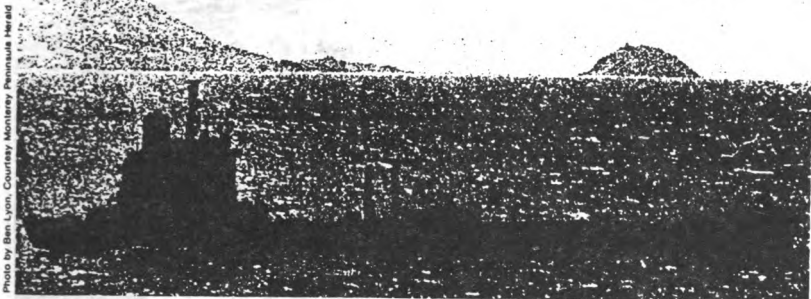
Ground surveys, supplemented with aerial observations in areas inaccessible from shore, conducted jointly by U.S. Fish & Wildlife Service and California Department of Fish & Game:

Spring 1982	1,124	222	1,346
Fall 1982	1,194	144	1,338
Spring 1983	1,153	122	1,275
Fall 1983	1,062	164	1,226
Spring 1984	1,181	123	1,304

Experience has demonstrated that more otters are seen by land-based than aerial observers. Moreover, small pups are often impossible to spot from the air.

4/19/84: The Near-Grounding of the Sealift Pacific

Attachment 8



Santa Barbara News Press:

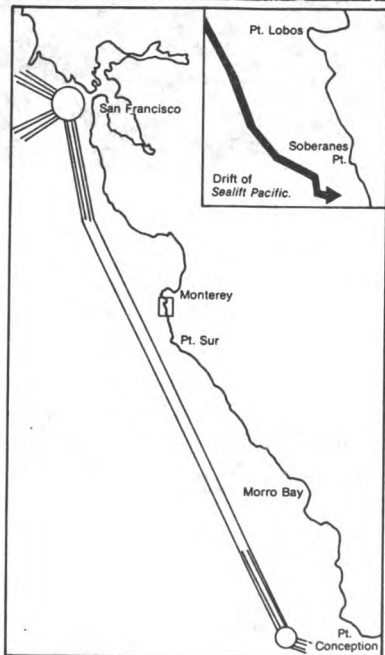
Drifting tanker threatens otters, but anchor holds at last minute

April 19, 1984 — Nightmare comes close to reality when the 587-foot tanker *Sealift Pacific*, ferrying over 6 million gallons of diesel fuel from San Francisco to Long Beach, loses power approximately 12 miles offshore and drifts helplessly throughout the night and morning until able to anchor just a mile and a half off Soberanes Point (north of Pt. Sur) in the heart of the California Sea Otter Refuge. Had her anchor not held, she would have broken up on the jagged shore. No Coast Guard vessel or commercial tug would have reached her in time to prevent a disaster.

What went wrong? A blown piston (could happen to any ship for the *Sealift Pacific* is a well-maintained U.S. Navy contract vessel). The tanker notified its agent of the problem at 1:30 A.M., but the Coast Guard wasn't alerted until 3 A.M. Not until 8:30 A.M. was a powerful tug dispatched from San Francisco (estimated transit time 8 hours). Not until 9 A.M. was the 378-foot Coast Guard cutter *Sherman* diverted to the scene (fortunately she was near Morro Bay, not her home port of San Francisco). The Coast Guard assumed the disabled vessel would be able to anchor before grounding, thus they did not notify either the U.S. Fish & Wildlife Service nor the California Department of Fish & Game that a heavily loaded tanker was drifting perilously close to the craggy Big Sur coast. (Fish & Game only learned of the danger when they overheard a ship-to-shore transmission.)

What went right? A highly-skilled captain was able to find secure footing for the ship's anchor just after 1:00 p.m., and the weather was mercifully cooperative. In a word, luck.

What can be done? Clearly, rapid response at the first report of trouble and immediate communication with state and federal wildlife agencies should be the Coast Guard's standard operating procedure for any potential oil accident near the sea otter range. A commercial tug powerful enough to assist a tanker in distress should be stationed within the otter range to eliminate the 8-hour delay entailed when sending a tug from San Francisco. **Most important, vessel lanes must be established along the central coast to insure that tankers stay far enough off shore so that in case of an accident there is adequate time to respond before a ship hits the rocks.**



U.S. Coast Guard Proposed Vessel Lanes

The Coast Guard will publish proposed vessel lanes (designed to reduce conflicts with offshore oil development) in the Federal Register this December, but as the map shows, the lanes are much too close to shore — in some places only 5-6 miles from major headlands — allowing virtually no response time in case of an accident.

THE OTTER RAFT — SUMMER 1984

10/31/84: The Tanker S.S. Puerto Rican explosion & Oil Spill
Attachment 9

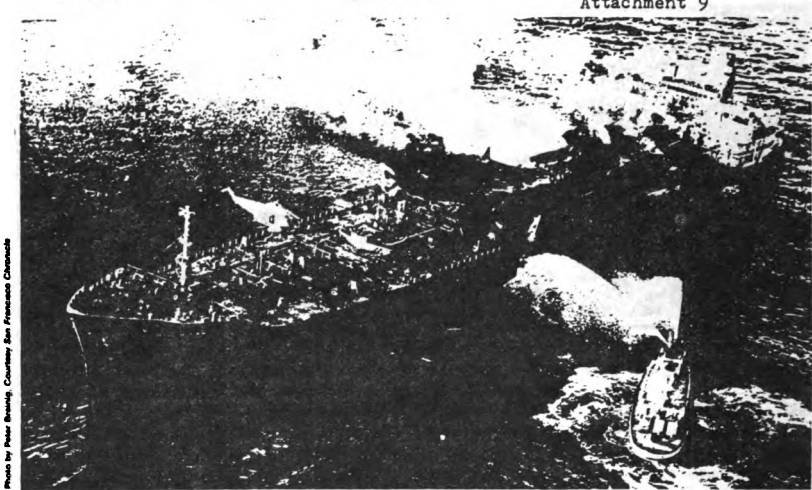


Photo by Peter Benning. Courtesy San Francisco Chronicle

HALLOWEEN HORROR

A Lesson Too Late for the Learning?

In the pre-dawn hours of October 31, 1984, three explosions ripped through the 632-foot-long tanker SS Puerto Rican, setting her ablaze about 10 miles west of San Francisco's Golden Gate Bridge. The U.S. vessel was ferrying approximately 101,000 barrels (over 4 million gallons) of petroleum product owned by Whitco and Chevron. So began a two-week long nightmare when early predictions that the Northern California coast would be spared a major oil spill quickly evaporated as virtually everything that could go wrong did.

- On November 3, as the crippled tanker was being towed about 26 miles offshore, she broke in half. Her stern section, containing an estimated 1.43 million gallons, sank to the bottom in 2400 feet of water, right on or within the boundary of the Pt. Reyes/Farallon Islands National Marine Sanctuary — one of the West Coast's most important areas for marine birds and mammals. There are fears that oil may continue to leak from the stern for years to come. Over 1,000 birds have already been oiled.
- Mechanical clean-up efforts were unable to prevent a 24-mile-long by 1/2 mile wide oil slick when the tanker broke up, or the 50 square mile sheen on the ocean's surface. Nor could they prevent the oil from slopping ashore along the Marin, Sonoma and Mendocino County coastlines, as far north as Fort Bragg, roughly 140 miles north of the spill. The first day of the spill, weather conditions were so bad that clean-up vessels couldn't even get on-scene. "Mr. Clean II," the oil spill response vessel, was seriously damaged when hit by a large wave and forced to retreat to Half Moon Bay. After being repaired, she was sent to protect the Farallon Islands, but collected only minimal amounts of oil due to lack of oil storage capability and heavy seas.
- Dispersants were applied from the air, even though no surface vessels were available to document the results. There is vast disagreement over the effectiveness of this procedure, estimates from aerial observers ranging from 0 to 70% effective. There is also growing controversy as to whether dispersants, which are highly toxic, should have been used at all.
- Oil Spill Trajectory Models were wrong by 180°. The National Oceanic and Atmospheric Administration predicted the spill would go south — most of it went north.

Implications for the Sea Otter

Had the spill moved as far to the south (as originally predicted) as it actually moved to the north, it would have entered the northern half of the sea otter range. In fact, it moved through roughly half of the Northern California area between Bodega Head and Cape Mendocino which has been identified as one of four possible sea otter translocation sites. Moreover, much of the oil which reached the beaches had not weathered as anticipated, but came ashore as a greasy foam which smeared on contact.

Contrary to the empty assurances so frequently given by the Western Oil & Gas Association, U.S. Interior Secretary Clark and California's Deukmejian Administration as they press to open additional areas to offshore oil development, the Puerto Rican spill unequivocally demonstrated, to quote the California Coastal Commission's staff report, "the inadequacy of oil spill response measures to protect the northern California coastline from the adverse impacts of oil spills." But this is one time we take very little pleasure in saying, "We told you so."

— CF

THE OTTER RAFT — WINTER, 1984/1985

Sunken tanker's oil leak called 'a time bomb'

By JAMES E. REID

SAN FRANCISCO — Emergency planning to deal with oil spills were effective, but weather and the ocean created problems state, federal and private agencies were unable to deal with, officials said at a state hearing Friday.

The Puerto Rican oil tanker, its sunken stern with an estimated 400,000 gallons of oil inside still leaking as it lies within the Farallon Islands Marine Sanctuary, has created "a time bomb none of us can walk away from," said Assemblyman William Filante, R-Greenbrae.

"On-site inspection" or "exploratory surgery" is needed to assess the present condition of the ship's remains. Until divers can inspect the stern and determine the extent of its damage, as well as its position on the ocean bottom, no steps can be taken to stop the continuing leak, he said.

While that examination, at a depth of 2,400 feet, could cost \$250,000, Filante said, "Speed is of the essence."

Several solutions are possible, including patching the leaking hull or pumping its remaining cargo out, but nothing is possible until all the facts of the situation are known, he said.

Sen. Milton Marks, R-San Francisco, said the joint hearing was called to determine whether the alert, response and clean-up effort during the Puerto Rican oil spill in November was adequate and what steps can be taken to improve reaction to similar future emergencies.

Explosions shattered the oil tanker and set off a massive fire Oct. 31 just outside the Golden Gate, resulting in a spill of as much as a million gallons of petroleum products into the ocean that washed onto beaches in Marin and Sonoma counties.

The ship burned 2½ days before tug boats could begin towing it out to sea, but shortly after that operation started the stern containing approximately 1.7 million gallons sank a half-mile inside the marine sanctuary. The bow, with 2.7 million gallons was towed later to dry dock in San Francisco.

Vice Admiral John D. Costello, commander of the U.S. Coast Guard in San Francisco, admitted the effort to tow the Puerto Rican off shore and remove its threat to the coastal environment meant it was towed across the southern edge of the Farallon Islands Marine Sanctuary.

With their knowledge of the ocean current off the coast experts predicted any oil leaking from the damaged ship would drift to the southwest, conditions suddenly changed and the oil drifted north to begin washing ashore on the Point Reyes National Seashore and later along the Sonoma Coast at Rodega Bay and the Estero Americano, Costello and others explained during the hearing before the Senate Select Committee on Maritime Industry, the Senate Natural Resources and Wildlife Committee and the Joint Committee on Fisheries and Aquaculture.

The best available information indicated the ocean current would continue to the southwest and the decision to tow the vessel in that direction was based on that information, said Dr. Jerry Galt, member of the hazardous materials response branch of the National Oceanic and Atmospheric Administration.

Galt said the effort was to get the disabled ship "as far away as quickly as possible" and that meant towing it in established shipping lanes, which cross the marine sanctuary.

Seven days later, when the current shifted to the north, the oil spill began washing around the Farallon Islands, then quickly moved to the shorelines of Sonoma and Marin counties. "But we were right for seven days," he said.

The problem, Galt admitted, was that the experts working on the spill miscalculated a changing front that shifted the currents very rapidly and pushed the oil spill 20 miles north overnight.

To suggestions that state or federal legislation increasing control over oil tankers or spill recovery operations might be a solution, Galt said existing emergency plans are adequate.

The problem with the Puerto Rican spill was the changes in weather and ocean that created conditions that were not only hazardous but impossible to deal with using existing equipment and technology, Galt said.

SAN NICOLAS: Island of Hope for the California Sea Otter

Rachel T. Saunders

A major breakthrough in the long-delayed recovery effort for the California sea otter came this past May when the U.S. Fish & Wildlife Service announced that it expected to name San Nicolas Island as the preferred translocation site for the first reserve breeding colony of southern sea otters. Target date for the actual translocation: September/October, 1985.

The Service's Draft Translocation Plan states that the "short term objective of this action is to establish a viable second population of sea otters, as soon as possible, so as to reduce the potential impact of catastrophic loss from the population, or damage to its environment, as might result from a large scale oil spill. The longer term objectives are 1) to recover the California sea otter from its present "Threatened" status under the Endangered Species Act, and 2) to attain an Optimum Sustainable Population (OSP), as required by the Marine Mammal Protection Act. Although the specific criteria by which these objectives could be met have not yet been determined, the establishment of one or more additional colonies of sea otters will be required in both cases." (Preliminary plans suggest translocating up to 150 animals — moving between 30 and 50 otters per year over a 3 to 5 year period.)

As required by the National Environmental Policy Act, the Service has initiated a scoping process to solicit public comment on issues relevant to translocation. Public hearings will be held this summer, with additional hearings to be held after the release of a Draft Environmental Impact Statement early next year.

Friends of the Sea Otter's strong support of a translocation effort was reaffirmed by the testimony of FSO Executive Director Carol Fulton during congressional subcommittee hearings on the reauthorization of the Marine Mammal Protection Act in Washington D.C. last March:

"After 12 years of protection under the Marine Mammal Protection Act and 7 years of protection under the Endangered Species Act, not only is the California sea otter's future still far from secure, but one of the primary steps recognized as necessary to insure the otter's survival is still far from realization.

"The southern sea otter will remain threatened with serious depletion or extinction as long as the entire population is located along the central California coast — an area where major oil hazards already exist and where increased oil-related activities are projected. Thus we have long supported translocations of small numbers of animals to establish reserve breeding colonies of southern sea otters in areas within their former range which provide good habitat and relative security from the threats which menace the parent population.

"We have given long and careful consideration to our decision to support translocation, for we realize that it entails a certain degree of risk to the animals. However, the risks to the individual otters and the impact of removing animals from the parent population must be weighed against the ever-increasing risk that many more could be lost in a major oil spill... and many more are already being lost through drowning in fishing nets. Moreover, a major spill could actually trigger a translocation by rendering a significant portion of the current otter range uninhabitable."

For many years, San Nicolas has been the favored translocation site of Friends of the Sea Otter. Situated off the Ventura County coast, the outermost of the Channel Islands, San Nicolas is positioned far enough away from the otter's present range so that it is unlikely to be affected by any oil spill which might impact the parent population. It is also well removed from the intense oil activity in the Santa Barbara Channel. Furthermore, as San Nicolas is a communications

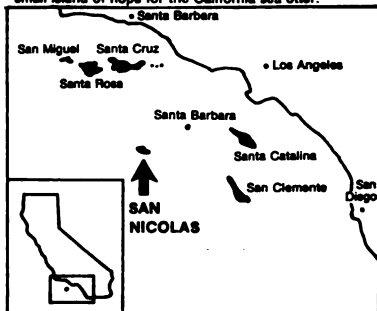
and missile tracking station for the U.S. Navy, objections raised by the Department of Defense have recently caused the U.S. Department of Interior to drop tracts in the vicinity of the island from upcoming Offshore Oil Lease Sale #80.

Located 80 miles from the Southern California mainland and over 20 miles from the nearest island (Santa Barbara), San Nicolas once supported large numbers of sea otters (over 900 were reported taken there by the fur trade in a 7-month period in the early 1800's) and today is a haven for healthy breeding populations of elephant seals, harbor seals and California sea lions. Surrounded by near pristine waters, kelp beds extending as far as 3 miles offshore and a nearshore environment characterized by a rich assortment of invertebrate prey, the island is biologically and physically ideal for sea otters.

San Nicolas offers a remote location protected from outside influences by U.S. Navy management and security, suitable harbors for releasing otters within close proximity to an airstrip, and access for shore-based observers and research divers who will monitor both the newly-arrived otters and the effects of their foraging on the island's coastal ecosystem.

As the principal intention of translocation is to establish a reserve breeding colony, it is essential that the translocated animals remain in the vicinity of the release site. Because it is separated from the mainland and other islands by wide expanses of deep open waters devoid of food resources, otters translocated to San Nicolas are likely to remain there rather than disperse. This potential to be naturally self-containing is a clear and important advantage of moving sea otters to San Nicolas rather than a mainland location. Unfortunately, however, the shellfish industry has yet to acknowledge this fact.

Although conflicts with shellfisheries are significantly lower at San Nicolas than at other potential translocation sites, organizations such as Save Our Shellfish are working hard to block a translocation to the island, claiming that such a move would threaten all of the remaining shellfisheries in Southern California. (Man's overfishing and pollution have already devastated the abalone resource along the mainland coast, and abalone stocks at the nearshore Channel Islands have been heavily impacted by sport and commercial diving pressures.) While there are legitimate concerns regarding the reintroduction of otters into areas utilized by shellfisheries, those relating to translocation to San Nicolas have been greatly — and we believe deliberately — exaggerated. For not only does the island location have the greatest likelihood of discouraging emigration into other areas, but state and federal wildlife agencies, as well as FSO, support additional efforts (if necessary) to contain the otters at San Nicolas by capturing and returning any strays to the island or the parent population from which they came. No one is advocating moving otters throughout the other Channel Islands or along Southern California's mainland coast, but there still are those who would begrudge even one small island of hope for the California sea otter.



Attachment 12

MARINE MAMMAL COMMISSION
1625 EYE STREET, N.W.
WASHINGTON, DC 20006

2 December 1980

Mr. Lynn A. Greenwall, Director
Fish and Wildlife Service
U.S. Department of the Interior
Washington, D.C. 20240

Dear Lynn:

We are concerned that the progress which has been realized to date in addressing the many facets of the California sea otter problem has been less encouraging than we had expected. The resolution of the problem will require decisions and actions to secure the population from threats associated with oil spills and other human activities and to restore it to the optimum sustainable population level, while at least minimizing conflicts between sea otters and fisheries. While a variety of efforts are underway, we believe that these efforts can and must be focused and structured more clearly if we are to resolve the sea otter problem in the near future.

With these thoughts in mind, the Commission recommends that the Service adopt and implement the following approach to the problem:

- (1) recognize the ultimate need for "zonal management" of the California sea otter pursuant to which the sea otter would be restored to additional sites within its former range although not to each and every area it once inhabited. Such "zonal management" would be based upon a determination that the Marine Mammal Protection Act's goal of optimum sustainable population can and should be achieved with reference to the "health and stability of the marine ecosystem" and that historic levels and distribution are not necessary to satisfy that goal;
- (2) recognize that the implementation of such "zonal management" will require, among other things: (a) designating sea otter areas or "zones" that will be secure from threats of those human activities including oil spills that would adversely affect the sea otters and that will allow otters to recover to and maintain optimum levels and contribute to the health and stability of the marine ecosystem, and, (b) designating areas or "zones" where there will be no sea otters because the habitat is not suitable, they did not formerly inhabit those areas, the threats to otters that might be translocated there would be too severe, or the conflicts between otters and fisheries would be substantial;
- (3) recognize that implementation of such "zonal management" will almost certainly require the development and utilization of effective techniques to maintain the otters within the designated otter zones and to keep them out of designated otter-free zones, and/or selection of otter zones that will, because of the nature of adjacent habitat or other considerations, be naturally self-limiting.
- (4) recognize that it is not necessary to complete all designations before taking action and that it is necessary to establish at least one additional group of sea otters at a site that is secure from the threat of oil spills as soon as possible;
- (5) complete the review and evaluation of available information and, in consultation with interested parties and while continuing the overall effort, decide where to translocate the first group of otters while taking into consideration the potential of the site to be self-limiting, its suitability as sea otter habitat, its accessibility for monitoring purposes, its security from threats, the nature and extent of possible conflicts with fisheries, and perhaps other factors;
- (6) decide the age and sex composition as well as number of otters to be translocated, with reference to the likelihood of that group's survival, impacts upon the population from which the group is removed, the area from which it should be removed, and translocation techniques to be used, and
- (7) accomplish the first translocation as soon as possible and closely monitor and evaluate the results thereof, while at the same time continuing other aspects of the California sea otter research and management program.

Obviously, the various elements of this approach are only summarized above, and we shall be pleased to discuss them in greater detail with specific reference to the recovery plan, our previous recommendations for compilation and mapping of available information, and the resource inventories and characterizations and other research efforts relating to this matter whenever would be convenient. However, we do believe that it is important and possible to select the site and accomplish the first translocation within the next 18 months, and would be grateful for your early response to our recommended overall strategy and the suggestion that the first translocation be accomplished within 18 months.

Sincerely,

Robert L. Twiss, Jr.
John R. Twiss, Jr.
Executive Director

STRUGGLE OVER THE SEA OTTER

California conservationists are fighting to save a favorite sea mammal from fishnets and offshore oil development

A CALIFORNIA TREASURE long believed lost has been found riding the blue, white-capped waves along the rugged shoreline south of Carmel.

Thus the May 14, 1938, San Francisco *Call Bulletin* reported the rediscovery of a small band of sea otters that miraculously had survived the 18th and 19th century fur trade. According to the San Jose *Mercury News*, scientists at nearby Hopkins Marine Station were "as near to wild rejoicing as men of that profession are permitted."

But that was 46 years ago, and the time for rejoicing has long since passed. Although the saga of the California sea otters often has been hailed as a triumphant return, lately the otter's survival has become increasingly precarious.

Sea otters once ranged in the hundreds of thousands along the Pacific coast from Baja California to Alaska and along the Aleutian Islands chain to Siberia and Japan. Discovered in the northwest Pacific by Russian fur traders in 1741, the otters were reduced to small, isolated populations by 170 years of slaughter for their pelts. By 1911, when sea otters finally were given protection under the International Fur Seal Treaty, California's original population, estimated to have been between 16,000 and 18,000 animals, had almost vanished.

Today Alaska's sea otter population, which also had been reduced to a mere remnant by the late 1800s, has rebounded to more than 130,000 animals. Another 10,000 or so are found off the Siberian coast. But the California sea otter population, esti-

by Carol Fulton

mated at perhaps 300 animals in 1938, still numbers less than ten percent of its abundance prior to the fur-trade era and occupies less than ten percent of its historic range.

In 1972, Congress in the Marine Mammal Protection Act gave primary responsibility for protecting the otters to the U.S. Fish and Wildlife Service (FWS). In 1977, California's sea otters were listed as threatened, giving them protection under the federal Endangered Species Act. FWS believes the population has not grown for more than a decade. Scientists now estimate the adult population at no more than 1,300 scattered over 200 miles of central California coastal waters bordering Santa Cruz, Monterey and San Luis Obispo counties, far fewer than the 1,800 to 2,000 animals estimated at the time of listing.

Whether today's low figures reflect an actual decrease or better censusing techniques is not known. But recorded mortality figures have spiraled. During the 1970s, 60 dead otters on the average were reported each year. Since 1980, the average yearly tally has risen to 128. This is a mere fraction of the real toll, since most otters that die at sea never are recovered.

Data gathered by the California Department of Fish and Game, the U.S. Marine Mammal Commission and FWS indicate that drowning in fishing nets set in nearshore shallow waters is the most immediate threat

to the population. Yet two years after this problem was first identified, the otters still have no protection from the nets throughout most of their range.

The high mortality of 1980 and 1981 coincided with a dramatic increase in the use of monofilament gill nets up to a mile and a half long by Monterey Bay halibut fishermen. Anchored to the bottom, the nets float upward in the water like a curtain and catch a lot more than fish. More than 17,000 seabirds, chiefly common murres and sooty shearwaters, were estimated to have drowned in the nets during the summer of 1981. Some 1,500 washed up on a three-mile stretch of beach in a single day.

In 1980, although no otters had yet been confirmed drowned in the nets, 144 dead otters were reported, more than twice the 1979 death toll and the most since records were first kept in 1968. The following year brought 151 more recorded otter deaths. The game department also found that the number of dead otters washing up on sandy beaches increased near areas of heavy gill net activity.

Although the bodies were recovered soon after being cast up on shore, they usually were badly decomposed. Game department biologists speculated that after the dead otters were removed from the nets and tossed overboard, they sank to the bottom, later to float to the surface and then to shore.

A mother otter nurses her baby in a kelp bed. Sea otters usually give birth to only one young. Though born with teeth, babies suckle for a year.

A drop to 99 confirmed otter deaths in 1982 brought hope that the partial closure in Monterey Bay was working, but probably it really reflected the lower fishing effort following the warm water conditions brought by El Niño. Last year, 116 documented deaths occurred. Other evidence gathered by state biologists and the Marine Mammal Commission indicated that otters also were drowning in the Morro Bay area in the southern part of their range.

By August, 1983, the Marine Mammal Commission had concluded that net entanglement "is quite possibly responsible for the apparent lack of population growth in recent years and could jeopardize the continued existence or welfare of the population if the annual take is exceeding the replacement yield." Estimates of drownings in the nets ranged from more than 150 otters during years of high fishing effort to 60 in low-effort years.

It was also in 1983 that the game department realized that the otters themselves were distributed along the sea-fathom depth curve in Monterey Bay. Thus the earlier 60-foot closure had concentrated the nets in the worst possible place for the otters. Because of continuing otter drownings, the legislature last June extended the Monterey Bay net ban out to 15 fathoms.

The most promising way to end the drownings—a ban on the use of entangling fishing nets in all waters less than 15 fathoms deep throughout the outer range—would still take almost a full year to enact. In the interim, otters would continue to die, but neither the game department nor FWS has yet agreed to undertake the emergency enforcement actions that could stop the drownings until a permanent legislative solution can be put in place.

But there is an even greater potential threat to the survival of the California sea otter population—a major oil spill within its limited range. Ot-

ters depend on their thick fur to keep them dry and warm. Oil mats the fur, allowing chilling water to penetrate to the skin. Death from exposure can come within hours.

Even if only lightly oiled, otters could be poisoned by licking the oil from their fur or eating contaminated prey. A spill also could decimate the shellfish on which the otters feed. No satisfactory methods have been found to keep otters from entering an oil-spill area or to capture, clean and rehabilitate them after they have been oiled.

Unfortunately, the waters where California's otters are concentrated are subject to a high rate of tanker spills. North of San Francisco, tankers usually travel about 100 miles out to sea. But in the deeper nearshore waters to the south they frequently come to within only 30 miles of shore, and sometimes much closer. It would take at least eight to ten hours for a Coast Guard cutter or commercial tug from San Francisco to reach a disabled tanker in the otter range.

No tanker lanes have been established along the central coast. Although the Coast Guard is developing new shipping-lane rules for the area, the rules are intended to reduce only the risk of collisions with offshore drilling rigs. The big ships still would be allowed to come perilously close to major coastal headlands, leaving almost no response time in case of an accident.

The California others' limited distribution makes them critically vulnerable to even one tanker spill. The wreck of the *Amoco Cadiz* off the coast of France in 1978 fouled some 200 miles of shoreline, the equivalent of the whole California outer range. According to an FWS study, a 1978 lumber spill from a barge off Big Sur within four weeks deposited boards over more than 80 percent of the range, a rough indication of how an oil spill would spread. The number of boards spilled was roughly equal to 29,000 barrels of oil. But tankers moving down the coast from Alaska may carry as much as 1.4 million barrels. When a tanker spilled some 6,000 barrels of diesel fuel and gasoline off Siberia's Paramushir Islands in 1964, 25 miles of coastline were oiled and more than 100 sea otters died.

No way has been found to contain a major oil spill in the sea conditions commonly prevailing in otter ranges.



According to the California Lands Commission, "Heavy fog and darkness virtually eliminate the use of any equipment because the oil cannot be seen. . . . Waves in excess of six feet or winds of 20 knots or more reduce the efficiency of all equipment to nothing."

A close call last April confirmed the reality of the threat. The tanker *Sealtift Pacific*, ferrying more than 143,000 barrels of diesel fuel from San Francisco to Long Beach, blew a piston and lost power 12 miles offshore. The ship drifted helplessly to within a mile and half of the coast before the crew was able to find secure footing for anchoring. The tanker was in the heart of the sea otter range, just north of Point Sur. Had her anchor failed, no help could have reached her in time to keep her from breaking up on the rocks. The volume of her cargo was greater than the total amount of oil estimated to have been lost in the ten-day Santa Barbara Channel oil blowout in 1969, which smeared some 140 miles of mainland and island shoreline.

That disaster was far to the south of the otter range, but since then offshore drilling has come much closer to the otters. In 1980, 10.1 million barrels of oil were extracted from the Santa Barbara Channel and

southern California waters. Twenty-seven million barrels are projected for 1985. By 1992-94, 144 million barrels are possible yearly from the channel and southern Santa Maria Basin. Development throughout the Santa Maria Basin, just off the southern portion of the otter range, could add another 85 million barrels to this annual total.

Although until last year exploration for offshore oil was restricted by state litigation to just south of the otter range, a Supreme Court decision last January allowed Secretary of the Interior William Clark to lease five tracts just off Morro Bay, deep within the southern part of the otter range. In the last few years this general area has held up to 25 percent of the otter population.

Conservationists are still fighting the leases. The battleground now will switch to the California Coastal Commission, since federal oil exploration permits are subject to commission review. So far, the commission has held that oil drilling in this area would cause unacceptable risk to the otters.

Last year, when the otters came up for their first five-year review required for species listed under the Endangered Species Act, the Western Oil and Gas Association, a trade group representing more than 100 oil

companies, tried to have them dropped from protection. The same thing was attempted early this year by Save Our Shellfish (SOS), composed chiefly of southern California shellfish industry representatives and divers, which retained the Pacific Legal Foundation, an ally of the Mountain States Legal Foundation formerly headed by James Watt, for the purpose. The SOS petition asserted that the otters no longer need protection and claimed that their "threatened" listing was "the result of inadequate technical data and political pressure by environmental extremists." Without proper management, SOS charged, the sea otter population "will, in the near future, eradicate all commercial and recreational shellfishing in California." In May FWS rejected the petition, finding that it did not "present substantial information in support of the requested action."

No one denies the otter's appetite for shellfish. To fuel the high metabolic rate required to keep warm in cold ocean waters, the otter eats the equivalent of up to 25 percent of its body weight daily, selecting from some 40 different invertebrate species. But many of these are not exploited by man, and one, the kelp-gnawing sea urchin, can decimate the kelp forests if not kept in check. A recent

A net-drowned otter is tagged before being put overboard in a study of the percentage of dead otters that wash ashore.



Jack Arnesen, California Department of Fish and Game

FWS study documented the beneficial role of the otter in restoring and enlarging kelp beds along the central California coast.

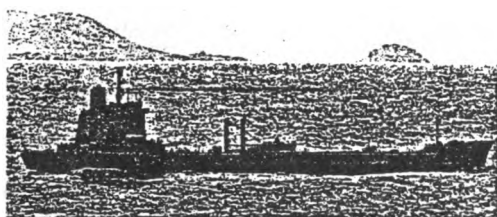
Kelp canopy composition has shifted to dominance by the giant kelp, the species most desired by kelp-harvesting companies. These companies now are cutting kelp from some beds that did not even exist prior to the return of the otter. The kelp forests also are important nursery areas for fish with both commercial and recreational value.

Save Our Shellfish's petition may have been filed to counteract a petition from Friends of the Sea Otter, a national conservation group based in Carmel, to reclassify the otter as endangered. FWS was reviewing this petition when SOS filed its request.

The Friends' bid for stronger protection failed last May, even though FWS agreed with virtually every point in the petition. FWS justified its avoidance of what many believe to be an inevitable reclassification to endangered by finding that the population was not in immediate danger of extinction and that major action on an active recovery plan is expected soon. However, in recognition of the speed with which the otter's situation could deteriorate, FWS agreed to review the population's status annually rather than every five years. The FWS Sacramento Endangered Species Office also concluded that a change to endangered listing should be considered immediately if there "is any indication of further threats, decreased numbers or reduced reproduction."

One of the major goals of the FWS recovery plan is establishment of at least one reserve breeding colony of California sea otters in order to reduce the risk of decimation of the state's entire otter population by a major oil catastrophe. Last May, FWS announced that it would prepare a draft environmental impact statement and identified San Nicolas Island, outermost of the Channel Islands, as the likely translocation site. With a target date of September or October, 1985, for the first transfer, preliminary plans call for transplanting up to 150 animals over three to five years.

Located 60 miles off the southern California mainland and more than 20 miles from the nearest island, San Nicolas seems biologically and physically ideal for establishing a new



The *Sealift Pacific* last April barely missed wrecking off Point Sur in the heart of California sea otter range. Its 6-million-gallon cargo of diesel fuel could have killed many otters.

population. Otters thrived there prior to the fur trade. Today the island supports healthy populations of harbor seals, elephant seals and California sea lions. Its pristine waters nurture lush kelp forests and a rich assortment of invertebrate prey.

San Nicolas is far enough from the otters' present range to be unlikely to be affected by any spill that might hit the parent population. It also is well-removed from oil activity in the Santa Barbara Channel. The Navy, which has a communications and missile-tracking station on the island, recently blocked offshore oil drilling plans in the vicinity.

Perhaps San Nicolas' most important advantage is its remoteness from the mainland and other islands. This would encourage the otters to stay, instead of dispersing as they probably would if released off the mainland.

Fishery conflicts are significantly lower at San Nicolas than at other

potential translocation sites, yet SOS is pressing hard to block the plan. But the fishermen's concerns regarding San Nicolas are exaggerated. Not only would the remote site discourage emigration into other areas, but state and federal wildlife agencies and conservationists have agreed that if any otters stray from the island they should be captured and returned to San Nicolas or the parent population.

The San Nicolas plan could provide strong protection for the sea otter. However, it must be implemented quickly. Protection on paper alone has been of little benefit to the species. The Endangered Species Act has not prevented offshore oil leasing and exploration from encroaching upon otter range. No one has been convicted of killing an otter for more than a decade, though shootings continue. The use of nearshore fishing nets over most of the otter range is still unrestricted, despite the knowledge that entanglement may be the leading cause of otter mortality.

FWS and the California game department need to put teeth into their plans and regulatory mechanisms. Until they do, it will remain an open question whether the California sea otter will again be sacrificed in our rush to reap the bounty of the sea. □

Carol Fulton is executive director of Friends of the Sea Otter, founded in 1968 to protect the California sea otter and its marine habitat.

How to Help Otters

You can help sea otter recovery by urging the California Fish and Game Department and U.S. Fish and Wildlife Service to move immediately to stop the drowning of otters in nearshore fishing nets and to move quickly on the San Nicolas Island translocation plan. Write: Jack Parnell, Director, California Department of Fish and Game, 1416 Ninth St., Sacramento, CA 95814; Robert Jantzen, Director, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240.

Mr. Bosco. Thank you very much. I appreciate your testimony. We certainly will not make the mistake of construing your silence on other subjects to mean assent.

The next and last person on the panel to testify will be Mr. Robert Gilmore, Associate Director of the Federal Assistance for the U.S. Fish and Wildlife Service.

STATEMENT OF ROBERT E. GILMORE

Mr. GILMORE. Thank you, Mr. Chairman. I would like to submit my formal statement for the record.

I appreciate the opportunity to appear before you today. As you know, the southern sea otter was listed as threatened in 1977. At the present time, the population stands at about 1,400 to 1,500 and it has not grown in recent years. Since its initial listing, a recovery plan has been developed and approved, and in 1984 a 5-year status review was completed. The status review concluded that the threatened classification is still appropriate.

There are two issues, in particular, that I want to briefly speak to you about today. The first is the proposed translocation of sea otters. As indicated in the letter to this committee last May, the Service has implemented a formal process to prepare an environmental impact statement and rulemaking, and notice of intent to prepare an EIS was published in June. Two public scoping meetings were held in July, and an interagency project review team was established to assist in the scoping process. Environmental interests, the oil and gas industry and the fishing industry, and a number of other interested agencies and organizations, have also been fully involved in the process all the way through.

A preliminary draft EIS has been completed and distributed for review by the bureaus within the Department, by the interagency team and by a number of other technical experts. We are now addressing the comments received on the plan and hope to have a draft EIS out for public review soon. I might add at this point that the volume of comments was quite large, and it may not be as soon as I would hope, but we hope to get the draft EIS out soon.

Translocation has potential environmental and economic consequences, but if it can be carried out and properly evaluated, it may lead to a very useful tool for the recovery and future zonal management of the species. To that end, we would propose to conduct a translocation as a scientific research project to study the impacts on the ecosystem, the otter population itself and the manageability of reestablishing a sea otter colony.

In addition to preparing an EIS, we are developing proposed rulemaking under the ESA section 10j authority. We believe this process will help address the concerns of others who may be affected by the translocation.

The second major issue is the drowning of sea otters in commercial nearshore gill and trammel nets. After 2 years of interagency effort, the extent of these losses was determined late last year. An estimated average of 80 sea otters have died annually in recent years in this way, for a 6-percent annual loss.

The Service has worked very closely with the State of California to restrict the fishing activity in a way that would stop the entan-

glement. In January, the director of the California Department of Fish and Game did invoke the 120-day emergency closure of the fishery within the otter's range as an interim measure to stop any additional drowning. A bill before the California Legislature would close the otter's range permanently to a large mesh gill and trammel nets.

Mr. Chairman, that concludes my abbreviated statement.
[The prepared statement of Robert E. Gilmore follows:]

PREPARED STATEMENT OF ROBERT E. GILMORE, ASSOCIATE DIRECTOR FEDERAL ASSISTANCE, U.S. FISH AND WILDLIFE SERVICE

Mr. Chairman, I appreciate the opportunity to provide the Subcommittee a discussion on our progress toward recovery of the southern sea otter and resolution of issues relative to the species.

As you know, the southern sea otter was listed as "threatened" in 1977 pursuant to the Endangered Species Act (ESA) primarily on the basis of the substantial possibility of a major oil spill resulting from a tanker accident along the central California coast. The threat of a major oil spill, combined with evidence that the current population inhabits only about 10-15 percent of the species' historic range, in our view warranted the "threatened" classification. The appropriateness of this classification was reaffirmed in 1984 during the 5-year status review. The Service concluded that the threat of an oil spill has not diminished since the initial listing and the population has not grown in size since that time. In addition, drowning of sea otters in nearshore gill and trammel nets has created threats and there is potential for expansion of OCS oil development activity into the sea otter's range. Although a recovery program has recently been implemented, these situations warrant the Service conducting an annual status review. At present, the population of southern sea otters stands at 1,400-1,500 individuals.

Substantial progress toward several major recovery actions has been made collectively by the Service, California Department of Fish and Game (CDFG) through a cooperative agreement authorized by section 6 of ESA, and other Federal agencies, including the Marine Mammal Commission. I would like to speak to two of these in particular.

The first is the proposed translocation of sea otters. In a letter of May 9, 1984, to this Subcommittee, Director Jantzen outlined a strategy and schedule to be followed to determine whether a translocation should take place and where. Because of the highly controversial nature and potential environmental consequences associated with translocation, the Service embarked on a scoping process following National Environmental Policy Act (NEPA) procedures, including preparation of an environmental impact statement (EIS) and rulemaking. The Service is fully engaged in this process. Public scoping was formally initiated in June with publication of a Notice of Intent to Prepare an EIS. Public scoping meetings were held in Monterey and Santa Barbara. An Interagency Project Review Team (IPRT) was established to assist in defining the issues and alternatives that need to be addressed and to provide technical assistance in reviewing various aspects of the EIS. The IPRT consists of representatives of the Minerals Management Service, Marine Mammal Commission, California Department of Fish and Game, and U.S. Coast Guard, although other interested agencies and interest groups have been actively involved in all IPRT meetings.

Preparation of the EIS is well underway. A preliminary draft (PDEIS) was distributed for internal and IPRT review late in January. We are in the process of analyzing the large volume of comments received and beginning to incorporate them into a final draft (DEIS) for public review and comment. We expect to publish the DEIS in May. A 60-day public comment period is anticipated and we plan to conduct at least three public hearings during that time. At least 5 to 6 months will be required to complete the process and make a final decision from the time the DEIS is published. While additional discussion is needed with interested parties, we believe substantial progress is being made toward resolving the very complex issues and concerns associated with translocation; however, several thorny issues still need to be worked out. We are quite optimistic at this point that an agreement can be reached which will promote recovery of the sea otter and at the same time address many concerns involving the fisheries industry, potential effects on off-shore oil development, and conflicts with the State's overall fish and wildlife management program. The period of August through early October is the optimum time for capturing,

transporting and releasing sea otters. Should the NEPA process extend beyond that time, it is probable that a translocation, if the decision is ultimately made to proceed, would not begin until the fall of 1986.

Briefly, Mr. Chairman, I would like to summarize several key points relative to the proposed translocation:

1. The primary purpose of the translocation would be to conduct scientific research to help answer a variety of important questions concerning:

The effects and feasibility of establishing and containing a new population within a specified area;

The beneficial and adverse impacts of the new population on components of the marine ecosystem;

Behavior and movements of otters after release and as the new population approaches the carrying capacity of the habitat;

Effects on the parent population from removal of various numbers and age/sex classes of animals from various parts of the sea otter range; and

Other factors necessary to an understanding of future recovery options.

In effect, the research would be a pilot study in zonal management of sea otters.

2. In addition to conducting the project under its general authorities for scientific research in the ESA and Marine Mammal Protection Act (MMPA), in conjunction with any decision to proceed with such a translocation, the Service proposes to promulgate special regulations under ESA section 10(j) which authorizes establishment of experimental populations. This will help to address concerns about the economic and other impacts of translocation, especially offshore oil development and military activities. Establishment of an experimental population requires a finding as to whether the new population is "essential" or "nonessential" to the survival of the subspecies in the wild. If found to be nonessential, the consultation requirements of section 7 do not apply to the experimental population except for animals found within units of the National Park or National Wildlife Refuge systems. If the experimental population is determined to be essential, the consultation requirements of section 7 would apply.

3. Uncertainties about delisting and long-range management are questions of vital concern to virtually everyone involved in the sea otter issues. If translocation takes place, and during the course of the study the translocated population becomes established as a viable breeding colony, one important criterion for delisting will have been met. If at the that time the parent population is stable or increasing relative to its current level and no significant new threats to it are evident, the delisting process can be initiated. However, even with delisting under ESA, options such as permanent zonal management would likely be limited by prohibitions of the MMPA that restrict "taking" (including capturing, killing, harassing) to scientific research unless the population is within its optimum sustainable population level, or "OSP." While the Service endorses the concept of zonal management, such a management program for the existing population would likely require amendments to the MMPA if done on a permanent operational basis.

4. The Service strongly believes the proposed translocation, if the decision is made to proceed, can and should be carried out as a scientific research project to answer many important questions and test hypotheses before implementing or authorizing a sea otter zonal management program in the future.

The second recovery issue I would like to touch on is the problem of accident entanglement and drowning of sea otters in nearshore commercial gill and trammel set nets. A year ago during the MMPA reauthorization process, we were acutely aware of the problem but at that time the extent of the losses had not been fully documented or quantified. This Subcommittee expressed particular interest in this issue and urged the Service to seek a solution. An organized monitoring effort to document the losses has been carried out jointly by the Service, State of California and Marine Mammal Commission since 1982. Analysis of the observation data was completed in 1984 by CDFG and revealed that the losses of sea otters occurring in the nearshore gill and trammel net halibut fishery are substantial. A final report released in January of this year by the CDFG projected that an average of 80 sea otters have been drowned each year in fishing nets. This represents an average of nearly 6 percent of the current population level that is dying each year through accidental entanglement in nets.

Although accidental and unintentional, these losses are illegal and unacceptable to the Service. Since regulation of the nearshore fishery is clearly a State responsibility, the Service looked to the State to institute appropriate regulatory measures to eliminate the mortality of otters in fishing nets. CDFG agreed to assume the lead and held a public hearing in September to seek views on permanent State legislation to restrict the gill net fishery in order to stop the entanglement problem. In

December a bill was introduced in the State Senate which, if enacted, would prohibit the use of large-mesh gill and trammel nets within the current sea otter range to a depth of 15 fathoms, and would authorize CDFG to permit testing of alternative fishing methods for halibut.

As an interim measure, CDFG Director Parnell invoked a 120-day emergency closure of the fishery on January 27 that effectively stopped this type of fishing throughout the otter's established range. We are hopeful that an appropriate permanent State legislative solution can be implemented prior to termination of the temporary emergency closure. Although close monitoring and enforcement will be necessary, State and Federal biologists believe provisions in the State legislation as now written would result in the almost total elimination of sea otter losses in commercial fishing nets. We would expect to see the otter population begin growing again after what is believed to be a stable or perhaps even a declining population over the past 10-15 years.

The status of this source of human-caused mortality could have a substantial bearing on future reclassification considerations and has a direct influence on whether a translocated population would be designated as an "essential" or "nonessential" experimental population in regulations to be proposed under the section 10(j) authority.

The service is proceeding on a number of other fronts toward ensuring protection and recovery of the sea otter. For example, we are currently informally consulting with the U.S. Coast Guard to determine whether a traffic routing scheme and offshore fairway system being considered by that agency along the central California coast may affect sea otters. A lengthy formal consultation with the Minerals Management Service was concluded in 1984 involving a proposal oil development plan for the Point Arguello field just to the south of the established sea otter range. The biological opinion concluded that the proposed development is not likely to jeopardize the continued existence of the subspecies and requested that Minerals Management Service and the Fish and Wildlife Service jointly review recovery needs and develop a cooperative program to enhance the recovery of the sea otter, thereby minimizing the potential risks posed by future development to the southern sea otter. We are also working closely with the State and oil industry in developing interagency oil spill response plans that emphasize protection for the sea otter.

Although much remains to be done, the Service believes that recovery efforts for the sea otter have progressed far beyond where they were last year at this time. This concludes my prepared statement and I will be pleased to respond to any question.

Mr. Bosco. Thank you very much.

I have a few questions I would like to ask. First, I might comment that I represent about a third of the coast of California, from Oregon down near San Francisco, so this issue is of interest to me. We don't have any oil drilling there now, and many of our people fear it for the future. It is interesting, to me, to see how some of these wildlife versus oil issues are resolved, since we have a vast amount of wildlife up there.

I have a question for Carol Fulton. What would your idea be of the range of the south sea otter along the California coast? What should that be expanded or contracted to be?

Ms. FULTON. There you have the major question that we are all here to address.

We think we need more otters in more places than we have them right now. Historically, they went from Baha to Alaska. They are occupying only about 10 percent of that range today. They are very vulnerable to oil. We think that we need at least one additional breeding colony in an area where it is not going to be hit by the same oil spill or catastrophe that could hit the parent population.

We think they need a larger area along the central California coast.

We also recognize that, in order to get more animals in more places, there are other economic and socioeconomic concerns which need to be addressed.

Our recognition of those other issues has led us to make a very significant concession. The otters used to abound throughout the Channel Islands and along the Southern California coast. All we are asking for now is one small island back. We are agreeing that they should be contained there.

I don't think that is asking for very much. I think we should allay any fears about our ability to contain the animals. The Fish and Wildlife Service and California Fish and Game clearly have the ability to go out and pick up animals. They have captured hundreds of animals for tagging. Unfortunately, what they don't have is the ability to capture a lot of animals in a very short period of time, for example, if we had a major oil catastrophe.

Mr. BOSCO. So you are willing to give up a wide range of otter population for just this small area of San Nicolas?

Ms. FULTON. Well, it is not solely up to me. There are a lot of other people, obviously, involved in this. But what we are asking for in Southern California is moving them for San Nicolas Island. That is all we are asking for. And we have agreed to contain them there. So I think that is pretty forthright.

Mr. BOSCO. Do you have plans for Northern California?

Ms. FULTON. No, we are saying—

Mr. BOSCO. Any that you would like to develop for the oil companies?

Ms. FULTON. You know, this goes back and forth all the time. The commercial abalone industry is very interested in this too. They would like to have a commercial fishery on the north coast.

As I said, we would like to have at least one additional breeding colony of otters. I think it is essential that the first one be established in the absolutely best place for the animals. San Nicolas is prime habitat. Otters abounded there before the fur trade. The animals are likely to stay there of their own volition because it is sea otter heaven.

Now, as to a second colony, you don't even know if you would ever have enough animals to be able to start it. But I think you would have more management options open once you got a first colony established, and at that point I think we would be more willing to look at Oregon or Washington.

Mr. BOSCO. We will await the unveiling of your plan for the second colony.

What do you believe is the single greatest threat to the sea otter? Is it from oil spills or natural predators, such as white sharks? That is their main predator, I guess.

Ms. FULTON. Yes, the white shark is the main predator on the sea otter. But I think far and away, oil spills are the greatest threat. Otters and sharks go back millions and millions of years together. There is always some loss to the white shark. That shouldn't be a problem. The only time it would ever get to be a problem was if you were to reduce the sea otter population to such a level that it could not sustain natural mortality.

Mr. BOSCO. I assume there aren't a lot of surfers near the San Nicolas Island.

Ms. FULTON. I don't think so.

Mr. Bosco. Mr. Rebeck, what are your estimates of the losses to the commercial and recreational fisheries of California that are attributable to the expansion of the sea otter range?

Mr. REBUCK. The expansion over, say, the last two or three decades? On that situation? Well, we had a very significant abalone fishery in Morro Bay that lasted for several decades, landing 2 to 5 million pounds of abalone a year, which has totally collapsed at this time.

Fifteen years ago we were talking about abalone that sold for \$6 a dozen for red abalones. The current price is about \$170 a dozen. Those are abalones that come from the Channel Islands. There is approximately \$100 worth of fuel to make a round trip to the islands. You are talking about an area that is not really the best abalone producing area because of currents and weather factors that are involved there. Most of that fishery now is in a 90-foot water depth. There is a tremendous amount of pressure on those islands from sport fisheries and from commercial fishermen. A great deal of that added pressure came after the collapse of the central coast, meaning from Morro Bay to the Piedras Blancas area. People left that area and moved down to Santa Barbara to engage in their chosen livelihood. So to put dollar values on that, gee, 2 million pounds times—I think a commercial diver makes around \$17 or \$18 a pound currently—

Mr. Bosco. It is substantial.

Mr. REBUCK. Oh, yes, it is hundreds of millions of dollars there. That is only one fishery. We also had a sea urchin fishery there for just a couple short years in the early 1970's. The sea urchin fishery in California is a very unique fishery. It is an export fishery where most of the product goes to Japan. I will ask maybe Mr. Steele to come up and speak directly on that fishery. Besides sea urchin, and pismo clams, we had a significant recreational clamming fishery there. I grew up in Morro Bay at a time when you could walk on the beach and pick up clams after a storm and get a legal limit of clams. We have evidence now that the sea otters in the Morro Bay-Pismo Beach area are taking anywhere from 60 to 80 legal-sized clams, that is a 4½-inch clam a day, or the equivalent thereof, and so you are talking hundreds of thousands and close to a million clams a year just with a few dozen sea otters. So now those fisheries have collapsed too. There is a definite impact on tourism. Also a lot of that fishery was not a tourist-oriented fishery. It was consumed by the local people. It was a subsistence and recreational fishery. You would find children and parents and grandparents, people of all ages, enjoying that recreation. We do not have that any longer.

Mr. Bosco. Thank you very much.

I have one question for Mr. Gilmore.

In relation to Ms. Armstrong's concerns about containing the sea otters were they to be moved, are you capable of containing these otters, or is that a major problem?

Mr. GILMORE. Mr. Chairman, we feel that we are capable of containing the sea otters in their location both physically and legally. We have some disagreements on that, but we feel we can.

Mr. Bosco. Physically and legally?

Mr. GILMORE. Yes; physically, means we can go out and catch the otter and put him back, and legally means where the law provides us with the authority to do that.

Mr. BOSCO. If you were given the legal right or responsibility to contain them, you would physically be able to contain them to that area?

Mr. GILMORE. We think we can.

Mr. BOSCO. Do you have patrol boats, or something like that?

Mr. GILMORE. We have a lot to learn about that. Containment is something that we have not really tested, it is not something that we have really gone out and tried, because we have not had to contain an otter population at a given location. However, we believe, and the scientists who work with them believe, that they can contain these otters.

Now, some of the otters, obviously, may be incorrigible, and they may just make up their mind they are going to go someplace else. With those, I think we can put them back in the parent population. But we do believe we can contain them. We may have patrol boats out there. They are not going to be running around and saying, "OK, everybody back inside the fence," but the point is, we think we can contain the translocated population.

Mr. BOSCO. They go fairly deep in the water, don't they? You probably will need a submarine fleet too.

Mr. GILMORE. Well, one of the common methods of catching the otters is with scuba equipment and nets while they are underwater.

Mr. BOSCO. If a number of these otters were to stray over to where the oil people have their rigs, would that cause you to have to take some kind of enforcement action, or how would that impair oil drilling?

Mr. GILMORE. Well, the first thing, if they did indeed stray out of the area designated—

Mr. BOSCO. Assuming they were left alive.

Mr. GILMORE. Well, yes. If they strayed out of the 10j designated area, the area that we would designate under the section 10j rule, we would be obligated, and we are committed to going out and catching those otters and moving them, putting them back with the parent population. That is what we are saying right now in the EIS. I think we still have some more to learn on that. That is our preliminary approach to it.

If an otter were to stay out there, if there is one of those little guys we can't catch, we are in the position of either having to dispatch that otter or, saying, that one otter at that particular time does not have any particular impact on drilling. We have not reached a conclusion on that particular point yet. We are still in that stage of trying to figure out how to do all of this and trying to put it forward in the EIS and get comments from everybody concerned and, hopefully, when we come out at the end of that process we will have some of these answers.

Mr. BOSCO. Do they tend to stray, or do they herd together?

Mr. GILMORE. We have had diverse experiences with otters. I think California put some otters out earlier on, and some of the people involved said they beat the boat back. We have moved other otters, and there were sitings of otters that were put out in Oregon

headed north. We just don't know for sure. We have put other otters out in Alaska and in Washington where they seem to have stayed where we put them. And one population in Washington seems to be growing. The populations in Alaska that we translocated, we had some stray, but there wasn't a great deal of effort to try to keep up with them because there was not that demand to understand what was going on with the population. But they seemed to relocate and repopulate the area that we wanted them in.

Mr. Bosco. Thank you. It is sort of an interesting proposition that I am sure we will all watch very carefully.

I would like to thank the panel. Your testimony was interesting and informative. We will excuse you and call up panel 5 on falcons.

We will continue with the hearing on the Endangered Species Act with a focus on falcons. I want to welcome you gentlemen and thank you for being here. The first person we will call to testify will be Mr. James Leape, Counsel for the Wildlife Programs, Audubon Society.

STATEMENTS OF JAMES P. LEAPE, COUNSEL, WILDLIFE PROGRAMS, AUDUBON SOCIETY; WILLIAM BURNHAM, VICE PRESIDENT, PEREGRINE FUND, INC.; FRANK BOND, REPRESENTATIVE, NORTH AMERICAN FALCONERS ASSOCIATION; AND RON LAMBERTSON, ASSOCIATE DIRECTOR, WILDLIFE RESOURCES, U.S. FISH AND WILDLIFE SERVICE, INTERIOR

STATEMENT OF JAMES P. LEAPE

Mr. LEAPE. Thank you, Mr. Chairman. I am here today on behalf of the National Audubon Society and its 550,000 members nationwide.

Although Audubon is committed to strengthening the Endangered Species Act in all respects cited by Michael Bean this morning—and we endorse that testimony—my comments this afternoon will focus on one provision in particular which is of special concern to us, and that is what is known as the raptor exemption. The raptor exemption provides, in essence, that the peregrine falcon is not protected by the key prohibitions of the Endangered Species Act, even though it is recognized by all and listed as an endangered species.

Specifically, the raptor exemption provides that peregrine falcons held in captivity as of 1978 or which are the progeny of those falcons are not subject to the prohibitions of section 9(a)(1) of the act. Key among those is the prohibition on interstate commerce in peregrine falcons subject to the exemption.

Now, before going into why we think it important that this provision be changed, let me first emphasize what we are not asking for today. We are not asking that falconers give up the peregrine falcons that they now hold. Any peregrine falcon legally held at this time could still be held.

Second, we are not asking for an end to the use of peregrine falcons in falconry. Peregrines legally held could still be flown in falconry. All we are asking is an end to interstate commerce in this endangered species. All we are asking for is an end to this exception which makes the peregrine falcon the only endangered species that is allowed to be transported and sold in interstate commerce.

The reason for our concern is twofold. First, it is clear that the provisions allowing transportation and sale of peregrine falcons have weakened the protection of that species. Operation Falcon, which you will hear much more about from the other panelists today, was a 3-year undercover investigation by the Fish and Wildlife Service. Operation Falcon revealed that there is substantial take of peregrines from the wild under cover of the raptor exemption. What I mean by that is that a significant number of people, falconers and others, are taking peregrines from the wild, banding them as exempt birds, that is, as captive-bred birds, and then transporting them in interstate commerce or selling them.

Therefore, it is clear to us that the raptor exemption presents a real threat to wild populations. Through a system of leg bands devised by the Fish and Wildlife Service there has been an attempt to insure that only captive falcons are traded in interstate commerce. But this banding system does not and cannot work. By taking peregrines from the wild as eggs or as young chicks, any person can slip on leg bands to disguise the birds as captive-bred and then trade them freely under the raptor exemption.

To date, 48 people have been indicted in the United States for violations of various laws protecting raptors. Sixteen of those have been indicted for violations of the laws that protect the peregrine falcon, and at least a dozen have been involved in manipulating these bands, to hide peregrines that have been taken from the wild.

Further evidence released by the Fish and Wildlife Service, that is, the affidavits which they submitted to the courts to obtain the search warrants used in this investigation, reveal as many as 60 peregrines may have been taken from the wild or transported in interstate commerce, and the investigation is not yet over, so we do not yet know the full extent of the take of peregrines from the wild.

In any case, so long as the price of peregrines hovers between \$1,000 and \$6,000 apiece, it is clear that the incentive to take birds from the wild will be strong. It is also clear that so long as sale and transportation in interstate commerce is allowed, it will be very difficult to prevent those takings, because, as has been recognized since the beginning of Federal wildlife law enforcement, prohibitions on interstate commerce in protected species are essential to the protection of wild populations. And, in fact, many of the techniques used in Operation Falcon, which the North American Falconers Association, and others, have complained about, were made necessary by the fact that sale and transport is not by itself a crime. For that reason, we urge this committee to repeal the raptor exemption.

Now, the principal case made in support of the exemption has been, historically, that private raptor breeders are making a significant contribution to the restoration of the wild populations. However, true that was in 1978, the fact is that is no longer true today. Although there are 51 people trying to breed peregrines in private facilities, they produced a total 13 birds for reintroduction into the wild last year, excluding, of course, the 5 birds produced by falconers now under indictment.

While legitimate private breeders produced a total of 13 birds for reintroduction to the wild, the Peregrine Fund, funded by private

contributions and the U.S. Government, reintroduced 254 peregrine falcons last year. In short, private breeding operations are not making a significant contribution to the recovery of wild populations, and the sale provisions which were supposed to facilitate those operations or encourage those operations are in fact posing a significant threat to wild populations.

For that reason, we urge the committee to repeal the operative language of the raptor exemption and to extend to the peregrine falcon the same protection that is now provided to all other endangered species.

Thank you.

[The prepared statement of James P. Leape follows:]

PREPARED STATEMENT OF JAMES P. LEAPE, ON BEHALF OF THE NATIONAL AUDUBON SOCIETY

I am James P. Leape, Counsel for Wildlife Programs of the National Audubon Society. I appear today on behalf of the National Audubon Society to urge the Committee to reauthorize a strong Endangered Species Act.

The National Audubon Society was founded at the beginning of this century to work for the protection of endangered species of plants and animals, and, in particular, endangered species of birds. Today Audubon represents over half a million Americans dedicated to that effort.

My testimony today will focus on one specific issue that is of particular concern to Audubon and its members—the protection of the peregrine falcon. Before discussing the threats that now face the peregrine, and the measures that we believe are necessary to protect it, let me briefly summarize our other concerns about the effectiveness of the Act.

We believe that the current endangered species program, first created by Congress in 1973, is basically sound, and we do not now ask the Committee to consider any fundamental changes. Nonetheless, in many important respects, the Act is failing to achieve its purposes. Many of these failings are set forth in the thorough and incisive testimony of Michael Bean, which the Committee heard earlier today. We endorse that testimony, and urge the Committee to adopt the modest measures that Mr. Bean proposes as necessary to address the problems he has identified.

First, we urge the Committee to authorize increased funds for implementation of the Act so that: (1) the Departments of the Interior and Commerce can accelerate their listing decisions, to more quickly extend the protections of the Act to the more than one thousand "candidate" species known to be in danger of extinction; (2) the Departments of the Interior, Commerce, and Agriculture can carry out the many recovery plans that have been prepared but never implemented; (3) the states can build strong endangered species programs to supplement the federal effort; and (4) the United States can assist the efforts of developing countries to protect their rapidly dwindling biological diversity. Second, we urge the Committee to provide some protection for species identified as candidates for listing, so that federal actions do not continue to extinguish species as they are being considered for protection. Third, we urge the Committee to provide stronger protection for endangered plants, by forbidding the malicious destruction of endangered plants and the taking of specimens from private lands without the landowner's formal consent. Finally, we urge the Committee to reject the proposals of western water developers to exempt their projects from the Act's protections; for the reasons set forth in the testimony of Robert Davison (presented earlier today), we believe that the Act provides appropriate mechanisms for resolution of conflicts between the protection of endangered species and western water rights. We urge the Committee to demand vigorous enforcement of these provisions.

THE RAPTOR EXEMPTION

I am testifying today principally to ask the Committee to extend the full protections of the Endangered Species Act to the endangered peregrine falcon. Over the past decade and a half, the federal government alone has spent more than \$14 million on programs to restore peregrine and other raptor populations. Yet, since 1978, the peregrine falcon (the only endangered raptor used for falconry) has been subject to a special exemption (ESA Section 9(b)(2)). That exemption, known as "the Raptor

Exemption," allows interstate transport and sale of peregrines that were held in captivity on November 10, 1978, or are the progeny of any such birds.

Congress adopted the Raptor Exemption on the assurances of the North American Falconers Association (NAFA) that the exemption would have no detrimental effect on wild populations, and that it was necessary to encourage private breeding projects for the benefit of the species. It is now apparent that these assurances were ill-founded. Operation Falcon, a three-year undercover investigation by the U.S. Fish and Wildlife Service (USFWS), has revealed that, under cover of the Raptor Exemption, some unscrupulous falconers have been taking peregrines from wild populations for sale or use in falconry, claiming the birds as captive-bred. Moreover, after six years, the many small private breeding projects spawned by the Exemption are not producing any significant benefit to the species. The Raptor Exemption has proven to be little more than a license for interstate commerce in an endangered species, for recreational use, at the expense of wild populations. We urge the Committee to repeal it.

1. Take of Peregrines from the Wild.—Operation Falcon has provided extraordinary insight into the black market in birds of prey. Through the extraordinary undercover work of the U.S. Fish and Wildlife Service, and a unique opportunity to penetrate the market through an established falconer, the Operation uncovered a burgeoning illegal interstate and international commerce in peregrine falcons, gyrfalcons, and other raptors. The investigation continues, but already it has led to the indictment of over 75 falconers here and in Canada, under virtually all of the federal laws protecting birds of prey. It has also shed considerable light on criminal activity that ordinarily defies enforcement—the theft of birds from the wild.

The information already available from Operation Falcon reveals the threat now faced by wild peregrine populations. The problem can be simply stated. To allow commerce in "pre-1978" and captive-bred peregrines, the Service must depend upon a banding system to identify birds qualifying for the exemption. But Operation Falcon demonstrates that such a banding system can be and has been easily defeated by substantial numbers of falconers and others who have used the bands to disguise as exempt birds that were illegally taken from the wild.

The Fish and Wildlife Service uses two types of leg bands to identify birds lawfully held under the Raptor Exemption. Peregrines held in captivity in 1978 are marked by adjustable black bands. The captive-bred progeny of those birds are marked by seamless, nonreusable, numbered bands that can only be slipped on the falcon's leg in the first two weeks of life. Operation Falcon revealed that falconers have used both kinds of bands fraudulently to cover peregrines taken from the wild for use in falconry or in interstate commerce under the Raptor Exemption.

Some falconers have disguised adult peregrines taken from the wild with bands issued for "pre-1978" birds that died or escaped (without the band on), but whose loss the falconer did not report. One of the falconers indicted is alleged to have obtained a band by falsely reporting that he held a pre-1978 peregrine, and then used that band to cover a peregrine taken from the wild in 1983.

Most often, falconers have used private breeding facilities to "launder" birds taken from the wild as eggs or eyasses (chicks) less than two weeks old, by marking those birds with the seamless bands issued for identification of birds produced by the breeding facility. Although we have no doubt that most breeders are honest, Operation Falcon has established that a substantial number are not—so far, 16 raptor breeders in the United States have been indicted in Operation Falcon, including 6 breeders holding peregrines under the Raptor Exemption. [Of the 16 indicted, 13 have pled guilty, 3 await trial.] Just last month, the government of Canada filed charges against a falconer who is the largest private peregrine breeder in the United States, holding 20 peregrines.

To date, 16 falconers have been indicted in the United States for illegal trafficking in wild peregrines. Of these 16, at least 12 were alleged to have fraudulently marked the birds with bands issued for captive or captive-bred peregrines. Thirteen of the 16 have been convicted, 1 has been acquitted, and 3 await prosecution.

Until Operation Falcon is completed, we will not know the full extent of the harm to wild peregrine populations done by falconers who abuse the Raptor Exemption. It is already clear, however, that so long as the Raptor Exemption remains on the books, the take of peregrines from wild populations will continue. There are a substantial number of people, falconers and others, who are willing and able to take wild peregrines for sale or for their own recreational use, and the safeguards intended to protect those populations are simply inadequate.

2. The Raptor Exemption Does Not Benefit Wild Peregrine Populations.—The principal justification offered for the Raptor Exemption has been that it encourages small private breeding operations, by allowing them to trade or sell some of the

birds they produce. In 1978, NAFA and others claimed that such operations were principally responsible for restoration of peregrine populations in the wild. If that claim could be made in 1978, however, it certainly cannot be made today. The many small, private raptor breeding operations encouraged by the Raptor Exemption do not make any significant contribution to the recovery of peregrines in the wild. The effort to restore wild peregrine populations has been left almost entirely to the non-profit Peregrine Fund.

Every person attempting to breed peregrine falcons or other raptors must obtain a permit from the U.S. Fish and Wildlife Service and must each year file a report with the Service describing his or her activities under the permit. Through the Freedom of Information Act, Audubon has obtained copies of the reports filed with the Fish and Wildlife Service for 1984. These reports reveal that, although there are many falconers trying to breed peregrines, few of them are successful and few of those contribute any peregrines to wild populations.

According to the reports filed with the Fish and Wildlife Service, there were 51 breeders (not including the Peregrine Fund) holding peregrine falcons in 1984; they held a total of 226 peregrines. Six of these breeders, including two of the largest, are now under indictment, or have already been convicted, as a result of Operation Falcon. The remaining 45 breeders produced a total of 65 peregrine chicks in 1984; 52 of these peregrines were kept, or were sold or given to other falconers; 13 were released to the wild.¹ Of these 45 breeders, only four produced peregrines for release to the wild.

The Peregrine Fund presents a striking contrast. In 1984, the three branches of the Peregrine Fund (in Ithaca, New York; Boise, Idaho; and Santa Cruz, California), produced 270 peregrine falcons from captive stock; at least 254 of these birds were released to the wild.²

In short, the Peregrine Fund dominates the effort to restore peregrine populations in the wild. By itself, the Fund produced over 95 percent of all peregrines released to the wild last year. Taken together, the Fund and a small handful of private breeders accounted for 100 percent of the peregrines released to the wild. The operation of the Peregrine Fund does not depend upon the Raptor Exemption—the Fund is financed by government and private contributions, not by the sale of peregrines. It thus cannot seriously be contended that the Raptor Exemption promotes the recovery of wild populations. And as explained above, it has led to abuse of those populations.

We therefore urge the Congress to repeal the operative language Raptor Exemption. More specifically, we urge the Congress to declare that all peregrine falcons, whether captive or wild are protected by the Section 9(a)(1) of the Act, that is, that no peregrine falcons may be transported or sold in interstate or international commerce.

Let me emphasize first what we are not asking Congress to do. We are not asking Congress to force falconers to release peregrines that they now legally hold—all peregrines legally held in captivity on November 10, 1978, and the progeny of such birds, may be held. Furthermore, although we find it difficult to justify the use of such an endangered species for sport when that use appears to encourage taking from wild populations, we are not asking Congress to permit the use of peregrines in falconry.

We today ask Congress only to prohibit transportation and sale of peregrine falcons in interstate commerce. This is a modest change, but we are convinced that it will provide needed protection to the peregrine.

For decades, Congress has recognized that prohibition of interstate commerce in wildlife is essential to effective protection of wild populations. Like every other major federal wildlife statute, the Endangered Species act is based on this principle. The principle applies with special force to protection of the peregrine falcon.

The opportunity to trade and sell peregrine falcons offers substantial potential profit to the unscrupulous. Falcon smugglers indicated in Operation Falcon have re-

¹ The 1984 report for one large breeder, Col. Richard A. Graham, which indicates that he produced eight birds, does not indicate the species of the birds produced. We therefore rely here on his production records for 1983, which indicate that he produced five birds, all hybrids.

² The Peregrine Fund raises falcons both from eggs laid by its captive stock and from eggs taken (under special permit) from wild nests. Although the PF newsletter and reports indicate that the Eastern and Pacific programs released 152 peregrines produced by captive stock, it is unclear how many of the 120 peregrines released by the Rocky Mountain program were captive-bred. As 18 wild peregrines were raised, the number of captive-bred peregrines released in the Rocky Mountain program could be as low as 102. The total number of captive-bred peregrines released into the wild by the Fund is thus somewhere between 254 and 272. We have used the more conservative figure.

ported sales of peregrine falcons at \$4,000 in this country, and over \$6,000 on international markets. Such prices are powerful temptation to take peregrines from the wild. While some have claimed that captive breeding operations would satisfy the demand for peregrines, Operation Falcon has proved them wrong. Whether it is because many falconers prefer wild birds, or because captive breeding is just too difficult, there is a substantial market for peregrines and other Raptors taken from the wild.

So long as the Raptor Exemption allows the sale of captive-bred peregrines, it will be difficult if not impossible to end commerce in wild peregrines. As Operation Falcon revealed, the leg bands used to identify captive-bred birds can too easily be used to provide a nearly perfect shield for the trade of wild birds. So long as commerce in any peregrines is legal, such devices will continue to defeat law enforcement efforts.

Simply put, it is one thing for law enforcement officers to prove that a bird was sold in interstate commerce, it is quite another to establish that the bird was illegally taken and fraudulently banded. The North American Falconers Association has complained bitterly about some of the undercover techniques used in Operation Falcon. But so long as enforcement of the Act requires the Fish and Wildlife service to prove not only that a person sold a peregrine, but also that the peregrine was taken from the wild, those techniques, difficult and expensive as they may be, will be the only recourse for effective law enforcement.

Let me reiterate that we do not condemn or oppose falconry. Most falconers are honest, and share our commitment to the protection of wild raptors. We hope that these falconer will join us in asking that Congress restore to the peregrine falcon the full protections of the Act, and prohibit all interstate commerce in these endangered birds.

Mr. Bosco. Thank you very much.

I now call on Dr. William Burnham, the vice president of the Peregrine Fund.

STATEMENT OF WILLIAM BURNHAM

Dr. BURNHAM. Hopefully, this is the right microphone. When you come out of the hills of Idaho, things like this can confuse you.

Mr. BOSCO. We can hear you just fine.

Dr. BURNHAM. OK, great.

We certainly appreciate the opportunity to come and have a chance to speak to this committee and for the folks to listen in the audience. It always seems sort of funny to speak to fewer people in front of you than exist behind you, but I guess that is the way of the world.

The Peregrine Fund is in a rather unique position to be able to comment on the Endangered Species Act and the things that are being discussed today, and for that matter, my background gives me a rather broad perspective. I am a member of the National Audubon Society and past chapter director. I am a member of the North American Falconers' Association. I am a scientist. I have been in charge of the Peregrine Fund's Peregrine Falcon Recovery Program throughout the Rocky Mountains for the last 10 years. So I have, I think, a fairly balanced perspective on many of the issues.

The Peregrine Fund is also in a rather unique position. It is a nonprofit organization. It was created by my boss, Dr. Tom Cade, who is a professor of ornithology at Cornell, and it was created because of the decline of the peregrine falcon, and its original purpose is the sole purpose of recovering that organism. We operate from three facilities, one located at Cornell, one located in Boise, ID, and one located in California. From those facilities we raise peregrine falcons and release them to the wild in various regions. It has worked out quite well.

There has been excellent cooperation. We have worked with 22 State wildlife agencies. We have worked with all the Federal wildlife groups and land management agencies, most of the national conservation groups, corporations, and tens of thousands of individuals across the United States. So we have received very broad support.

As a matter of fact, our friends here on the panel today have cooperated in this effort—and I think to help to put things in perspective, we really need to look at their contributions. The falconers were probably the most active in drawing attention to the esthetic importance of falcons, helping stop their killing, sounding the alarm of their decline, and donating birds to the program to establish initial breeding stock, which recovery has been based on, and, more recently, contributing young falcons from their private propagation projects for release.

The National Audubon Society has been important in drawing attention to environmental problems affecting the peregrine, and has assisted on many fronts in the recovery, including contributing funds, dollars, to build the facility in Colorado that we had up until a short time ago. So they have been an active participant.

The U.S. Fish and Wildlife Service has the ultimate responsibility, having received the mandate from Congress. We have had, for the most part, excellent cooperation from them, and they possess many fine biologists who have been extremely active in the program.

All this cooperation has caused some rather dramatic and successful results, actually the most successful, I believe, of all of the national endangered species programs. The program stretches from the Pacific to the Atlantic, and extends beyond our borders to the north and south.

In the eastern United States, the peregrine was completely lost, from an estimated population of something over 350 pairs. This last year we had 27 pairs return to territories, and we predict that by 1988 there will be a self-perpetuating population of in excess of 100 pairs of peregrine falcons. That is a very dramatic result.

In the Rocky Mountains, the population was probably reduced to about 10 percent of what once existed.

Now we have peregrine falcons that are beginning to breed in Montana and in Wyoming. The population in Colorado was down to four pair, but last year it was up to 13. We have birds breeding again in northern Utah, and we have peregrine falcons being seen in Idaho. Some dramatic strides have been made.

On the Pacific coast, the peregrine was probably reduced down to about 10 percent, and from our facility there at the University of California at Santa Cruz, they have released many, many peregrine falcons, and there is a recovery underway.

It very very good. But all of these things wouldn't have happened without the existence of the Endangered Species Act, or at least it is very doubtful. The act has acted to clarify and draw attention to the problem, create a sense of urgency and importance, encourage cooperation, and provide a vehicle for funding—all very important.

One aspect of the act which was mentioned, and is included in this 1978 amendment, is the exemption for captive-produced birds of prey. The exemption has been rather important to the act. It has

encouraged noninstitutional propagators to breed peregrine falcons in captivity. It has helped to increase the total captive population. It has increased the number of these birds that have been used in falconry, and a portion of those birds are annually lost to the wild in good condition and they are potentially breeding and adding a few birds.

Some things that it has not done, which originally was a fear for a number of folks, was the falconers removing their birds from the program. As I mentioned earlier, our initial breeding stock, much of it, was donated or loaned by falconers. When this amendment was passed many people feared that the birds would be removed by these people and produced captively by them. But that has not occurred. To really address just what kind of an impact this group of people out there that had peregrine falcons or have peregrine falcons have made, this year we released over 300 peregrine falcons between the three programs, and probably about a third of those birds, conservatively, originated from stock that were donated or loaned to the Peregrine Fund, or young produced from those birds, or through direct contribution of eggs or young. So there has been, I think, a very positive impact.

There is also, the question of protection. The peregrine falcon has substantial protection under the Migratory Bird Treaty Act. The issue of protection is an interesting one because I think we have to remember why the peregrine falcon declined. Throughout, say, the eastern United States it really was not lost because of human take or shooting or these types of activities or, harassment; it was lost because of the use of DDT that was ingested with prey and the resulting egg shell thinning and egg breaking and just no reproduction. That is the reason why the peregrine falcon declined. The reason why it has recovered has really not been the protection from human take or disturbance that many have been offered, it has been because of reduced levels of DDT in the environment, production, and release of peregrine falcons, funding and the cooperation and the hard work of many.

Several things, we believe, should be looked at in continuing this recovery effort. One is the funding. Funding for captive breeding and release continues to be very important and critical in the operation. Matching funds for the States under section 6 of the act is very important. It encourages cooperation between the States and between the States and Federal Government, and allows for these different wildlife agencies to continue their programs.

Funding for the Federal agencies is also important for research, management, consultation and administration of the Endangered Species Act.

We should be careful, or I would hope that we would be careful, not to punish different States or organizations that are very interested in a particular endangered species by reducing, say, for example, levels of section 6 funding because they are successful at raising additional funds. As an example, in the State of Colorado, they have a checkoff on the income tax, and their section 6 funds were cut, I understand, because of this increased alternative revenue, and that is really unfortunate, when they were trying to improve on their program. I think we should be sensitive to this.

We also should continue to be sensitive to the use of DDT. Currently in Texas, in the southwest corner, we have peregrine falcons attempting to breed in Big Bend National Park and other areas along the Rio Grande. The lizards down there are carrying 100 parts per million DDT, and there is some suggestion of illegal application. This is one guard I don't believe we can let down.

Also, we have extensive use of DDT in Central and South America. The peregrine falcon is a shared resource, and we emphasize that we need to continue to cooperate and expand cooperation, especially with Mexico and our Latin American friends.

Then we must remember the importance of the resource. We did not raise and release over 1,400 peregrine falcons by trying to do it 100 at a time or 1,000 at a time. We did it by caring about every egg and by caring about every bird. We can reflect on the national debt: the problem is in billions, but you first have to worry about the millions. The individual organism continues to be very important.

Another issue which must be addressed is the misuse of endangered species. The recent sting operation by law enforcement designated "Operation Falcon" has drawn considerable attention to illegal activities of some falconers and propagators, some involving endangered peregrines. The Peregrine Fund opposes any illegal removal of peregrine falcons from the wild by the falconers, law enforcement, or law enforcement operatives, and requests that the Congress urge the Secretary of the Interior to establish a policy which prevents the take or destruction of endangered species, or any wildlife, as bait in sting operations.

Any endangered species confiscated during investigation should be expertly handled and immediately returned to the wild, or if that is not possible because of the organism's condition, expeditiously made available for recovery efforts. Endangered species are not expendable. Consideration of the resource must come first.

In summary, the Peregrine Fund strongly supports the act, including the 1978 amendment. We encourage funding of endangered species programs at State and Federal levels and in the private sector. We encourage the Department of the Interior to increase cooperation with Mexico and Latin America, and to continually monitor and stop any illegal use of DDT in the United States.

We respectfully request that the Congress urge the Secretary of the Interior to establish a policy which prevents the taking or destruction of endangered species to be used as bait in "sting" operations. As mentioned previously, if endangered species are confiscated during investigations, they must be returned to the wild as quickly as possible.

We urge everyone to remember why the Peregrine Falcon Recovery Program has been a success, and that reason is because everyone has pulled together. Everyone has raised above his/her particular concerns and shown interest in the recovery of the species and its proper treatment. We would urge all of our friends here on this committee, and others, to continue to remember this as their differences may occur, and keep the resource in mind.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Burnham follows:]

PREPARED STATEMENT OF DR. WILLIAM A. BURNHAM, VICE PRESIDENT OF THE PEREGRINE FUND, INC. AND DIRECTOR OF THE WORLD CENTER FOR BIRDS OF PREY

Mr. Chairman, I appreciate the opportunity to come before this committee to comment on the Endangered Species Act on behalf of The Peregrine Fund.

The Peregrine Fund, a non-profit organization created by Dr. Tom Cade in 1970 because of the decline of the peregrine, is in a unique position to offer comment as we were working to save the peregrine falcon before the creation of the Act and have worked under the authority it provides since. We also work for the sole purpose of study and preservation of falcons and other birds of prey and in cooperation with many groups, including those on this panel. To date we have captively raised and released about 1,400 peregrine falcons, and have been intimately involved in all phases of the recovery program.

The peregrine falcon recovery effort has been unique. The effort has enjoyed the support and cooperation of a long list of participants. The Peregrine Fund alone has worked with and/or received assistance from 22 state wildlife departments, all federal wildlife and land management agencies, most national conservation groups, many corporations, especially those involved in energy and timber production, various foundations, and tens of thousands of people from across the United States. Participants have risen about their differences to assist in the singular objective of preservation and recovery of the peregrine falcon.

Because of this cooperation, the program has been the most dramatic and successful of any endangered species effort and stretches from the Atlantic to the Pacific Oceans and from Canada to Mexico. In the Eastern United States where the falcon was completely lost, 27 pairs were found occupying territories in 1984 and a self-perpetuating population should again exist by 1988. The recovery of the falcon in some areas of the western states is in its infancy, but again excellent progress is being made. Peregrines again breed in the Northern Rockies and the falcons are increasing in number in some areas along the Pacific. However, caution must be emphasized as reducing the support or emphasis in the recovery program before completion could easily bring about failure.

Each of the groups represented in this panel today have directly participated in, and made important contributions to, the effort. Falconers were probably the most active in drawing attention to the aesthetic importance of peregrines, helping to stop their killing, sounding the alarm of their decline, and then donating their birds to the program to establish the initial breeding stock which the recovery effort has been based on and, more recently, contributing young falcons from their private propagation projects for release. The Audubon Society has been important in drawing attention to environmental problems affecting the peregrine and has assisted on many fronts in its recovery, including financial contributions to help establish our peregrine propagation facilities in Colorado. Nationally, the U.S. Fish and Wildlife Service has the ultimate responsibility for the recovery of this endangered species as mandated by the Congress. The Service possesses many fine biologists who have been active in the program. Each group has been a key participant, but it is our opinion that without the impetus provided by the Act is unlikely the peregrine falcon recovery program would have made the dramatic strides which have occurred. The Act has functioned to facilitate the recovery by helping to clarify and draw attention to the problem, create a sense of urgency and importance, encourage cooperation, and provide a vehicle for funding recovery activities. We see the continuance of the Act as it is currently written as being critical to the continued recovery of the peregrine falcon and other endangered and threatened species.

An important aspect of the Act is the 1978 Amendment which provides an exemption for captive produced birds of prey (Public Law 95-632, Nov. 10, 1978). We have seen no negative implications for the recovery of the peregrine because of the passage and implementation of the Amendment, and we strongly recommend against any modification of it or its elimination. The exemption for captive produced raptors has expedited the recovery by decreasing the amount of paperwork and reducing delays in movement of falcons, both of which allow for more efficient management. The exemption has also encouraged captive propagation of peregrines by private propagators which has expanded the total captive peregrine population, increased technological advances (i.e. use of behaviorally imprinted falcons for propagation), and increased the number of falcons available to the recovery effort. The amendment has not jeopardized the level of protection against human depredation or disturbance of the falcon, which is adequately guarded against by regulation under the Migratory Bird Treaty Act. The decline of the falcon was not from lack of protection from human take or disturbance, nor is the recovery of the peregrine being caused by its protection. The decline was caused by reproductive failure due to egg break-

age induced by ingestion of DDT contaminated prey. The recovery is occurring because of reduced levels of DDT in the environment and the release of captive produced peregrines to the wild due to cooperation, funding and the hard work of many.

To continue and enhance the recovery, adequate funding is very important not only for captive propagation and release, but also for matching funds provided to state Wildlife Departments through Section 6 of the Act. Funding is important for research, management, consultation, and administration in Federal agencies. Encouragement should be given to those states and organizations involved by not reducing federal support because they are successful at securing private dollars to improve and enhance their programs. Punishing those who are sincerely interested and successful is counter productive.

The Peregrine Fund emphasizes the need for increased communication and cooperation between the Department of Interior and our neighboring countries, especially Mexico. Many of the peregrines which breed in the United States winter outside of this country, as does their prey. Peregrines are a resource we share. The recovery of the peregrine could be greatly enhanced if our neighbors were more active partners in the effort. It is very important that Latin American countries replace DDT with alternate pesticides.

Another issue which must be addressed is the misuse of endangered species. The recent "sting" operation by Law Enforcement designated "Operation Falcon" has drawn considerable attention to the illegal activities of some falconers and propagators, some involving endangered peregrines. The Peregrine Fund opposes any illegal removal of peregrine falcons from the wild by falconers, Law Enforcement, or Law Enforcement operatives, and requests that the Congress urge the Secretary of Interior to establish a policy which prevents the take or destruction of endangered species or any wildlife as "bait" in "sting" operations. And endangered species confiscated during investigations should be expertly handled and immediately returned to the wild, or if that is not possible because of the organism's condition, expeditiously made available for recovery efforts. Endangered species are not expendable. Consideration of the resource must come first.

"Operation Falcon" uncovered some abuses and no doubt others will occur in the future, and we of The Peregrine Fund denounce all. However, none of the illegal activities or their total have the damaging potential to the peregrine falcon recovery program and well being of birds of prey as the turmoil which has been created among many groups and individuals, all of whom are ultimately interested in the same goal of benefiting wildlife resources. Damaging documents, statements, and articles have raised tempers, polarized groups, and allowed emotions to be elevated above reason and logic. Trapped in this struggle is The Peregrine Fund and the recovery of the peregrine falcon, and both are suffering. The machinery—the existing Act, Amendments, or Regulations—is not broken, and the only changes required are for all parties to begin communicating and cooperating before irrevocable damage occurs. With the Endangered Species Act and renewed goodwill, the recovery of the peregrine is almost assured, but without both, all will be lost.

Mr. Bosco. Thank you very much, Dr. Burnham, for that very interesting testimony. I am sure it was appreciated by those very few of us in front and the many in back of you.

I would be anxious to get your elaboration on what we can do about the national debt, too. If you are as successful on that as you are with the falcons, I think we will pay attention to you.

The next witness we have is Mr. Frank Bond, who is the representative of the North American Falconers Association.

STATEMENT OF FRANK BOND

Mr. BOND. Thank you, Mr. Chairman. I appreciate the opportunity to be here this afternoon.

I am Frank Bond, an attorney from Santa Fe, NM, a member of the North American Falconers Association, and an active falconer.

Mr. Chairman, I won't touch on the national debt. That is beyond us. It seems like it anyway.

I am pleased to be here to represent the North American Falconers Association on this distinguished panel. I have submitted for

the record a statement, and I would like to have that recorded in the proceedings.

The North American Falconers Association is here to demonstrate its strong support for the Endangered Species Act, and also for the amendment that was exempted, the one subspecies, the peregrine falcon, that comes under it in 1978. We believe that the Congress demonstrated real foresight and wisdom in the original passage of the act on behalf of those flora and fauna which, by the acts of man or by natural causes, have been severely declining or in fact, since the time of the passage of the act, have become extinct.

Just to clarify the record, Mr. Chairman, the only subspecies we know of, of the peregrine falcon, that comes under the act whereby this exemption applies is the anatum subspecies, one of three of the North American subspecies, the other two being the tundrius and the peleai subspecies. I think that needs to be clarified.

In 1978, when a number of people, including some of us here, recommended the exemption be amended into the Endangered Species Act, the Congress in its committee report encouraged raptor propagation for science, conservation, and recreation purposes.

I remind the committee and you, Mr. Chairman, that that amendment took place in 1978. It was not until July 8, 1983, that any regulations having to do with that were promulgated under that exemption. We had a full long 5-year wait before there was an orderly implementation of that amendment. And it was clear that when the regulations came, although the regulations were codified in the sections dealing with the Migratory Bird Treaty Act, raptor propagators and similarly, falconers, dealing in another aspect of the use of the resource, are the most restricted and regulated people working under the Migratory Bird Treaty Act.

In fact, as I indicated, the regulations were finally passed on July 8, 1983, which fully implemented the exemption that we are talking about and the point of the controversy here, but as a matter of fact the seamless leg marker, which was the cornerstone of the orderly implementation of those regulations to be able to determine which birds were captive bred and which weren't, was not actually developed until the fall of 1983, thereby missing the entire 1983 breeding season. Finally, in 1984, in which we had only one breeding session so far, Mr. Chairman, it was available, and a few people did use it.

Therefore, given the fact that "Operation Falcon" was revealed on June 29, 1984, well into the 1984 breeding season, and the very fact that only about 6 or 7 States by that time had promulgated companion regulations to comport with the regulations under this exemption, we have hardly had an effective time period to determine the efficacy of the 1978 amendment.

As you have heard, "Operation Falcon" which was a "sting" operation designed by the Division of Law Enforcement of the Fish and Wildlife Service, was revealed on June 29, 1984, and in the press release issued by the then Secretary of the Interior, William Clark, and then Attorney General of the United States William French Smith, there were allegations of a large black market; 400 birds having been taken during that period of the "sting" operation which began, I believe, in 1980, and that many of these birds had

been offered for sale in the United States. It is beyond us still, looking at the record carefully, that there was any black market really in evidence. And the prime example of that, Mr. Chairman, is that during this operation the Fish and Wildlife Service Federal agents, to my knowledge, were unable to purchase a raptor of any species in the United States from a falconer or propagator, other than through their operative, who was a "sting" operative that set the whole mechanism in place.

Further, Mr. Clark Bavin, Chief of the Division of Law Enforcement—who is here, Mr. Chairman; he can refute me if he would like—admitted in a private conversation at the Raptor Research Foundation meeting on October 26, 1984, in Blacksburg, VA, that in fact there was nothing in the record that demonstrated that there were actually 400 birds that were taken from the wild and offered for sale in the United States during those 3 years.

With respect to the press release, which we believe did many falconers extreme harm, most of whom were not implicated whatsoever in this operation, we believe that either the allegations must be substantiated for the record, provided to the Congress and to us and others who are interested, or there ought to be a correction made by a public statement.

Simultaneously with the press release by Secretary of the Interior Clark and the Attorney General, the National Audubon Society, through their contact, Mr. Amos Eno, issued a similar release exactly the same day, and in fact, where the Fish and Wildlife Service estimated that some 30 people were arrested that day, the National Audubon Society's press release exaggerated that figure to 50, including the allegation that a number of prominent national leaders and officers of the North American Falconers Association—they referred to it as the "National Falconry Association" in the press release—were also indicted and charged.

Just for the record, Mr. Chairman, to my knowledge no national leader or officer of the North American Falconers Association was arrested or charged.

Second, in an interview with Alaska Public Radio, Mr. Eno admitted that the numbers he used there were basically his own estimates. And I do have a transcription of that interview. I am not sure, Mr. Chairman, whether that interview was actually aired or not, but it was prepared for airing.

The question then focuses on Operation Falcon—let me begin by saying that the North American Falconers Association and I personally as an officer of the court do not condone illegal activity by any of our membership or by any of the public with respect to endangered species, wildlife laws, or, for that matter, in my own case, any law. So what we must ask ourselves in terms of the importance of the Endangered Species Act here before you today under review, Mr. Chairman, is, what is the best way to enforce the law?

In fact, it seems that between 1980 and 1984, when the "sting" operation was revealed, there was a suspension of the law enforcement activities under the Lacey Act, the Endangered Species Act, and the Migratory Bird Treaty Act. The "sting" operative the Division of Law Enforcement used was turned in on three occasions to State authorities in Montana; he was turned in to State authorities in Wyoming; and he was turned in to a Federal law enforcement

officer in the State of New York. Obviously, Mr. Chairman, no action was taken because, with it, that kind of an operation does not thrive. We feel that had there been a systematic, fair, continuous, and even law enforcement effort throughout the period of time, we might not have seen those problems that we have seen by the actual encouraging of wrongdoing.

I think the agency can speak to the actual number of convictions and fines levied, and in my opinion everyone who went up there and pleaded guilty justified exactly what they got. There is just no excuse for any kind of wrongdoing or law breaking whatsoever.

I remind the committee once again that it is an extremely small number in terms of the total number of falconers in the United States. But three went to trial, Mr. Chairman. Three decided not to plead guilty, and we understand there is at least one more trial scheduled. That trial took place last fall in Montana, or, rather, it was during the early winter in Montana. One was convicted. His case is under appeal now to the circuit court of appeals. Two in were acquitted. I think the interesting point of the acquittal, Mr. Chairman, to demonstrate the aggressive nature of the "sting" operation, was that for the first time in the history of the law enforcement activities of the Service there were two apparently successful entrapment defenses.

Mr. Chairman, we are going to address a couple of other things that I think Dr. Burnham got into a little earlier. We in fact, as an association, were incensed by the use of endangered species or, in this case, their parts, their eggs, for a "sting" operation. We believe there is no justification for it whatsoever. But on May 18 and 19, 1984, a special agent of the Service and a "sting" operative, Mr. John Jeffrey McPartlin of Great Falls, MT, who had been a previously convicted trafficker in birds of prey, accompanied two target suspects. They went there, and in fact one of the targets did lift the eggs out of the eyrie, and those eggs were then lifted to the top of the cliff by Special Agent John Gavitt.

Mr. Chairman, it seems to us that while it is important to make a case against those who might have a propensity to do something wrong, we think that the nature of the resource is much more important than the case, given the fact that they had a number of other cases that were subsequently made. Mr. Chairman, I want to clarify this. There is nothing in the regulations or the act that I can find that allows law enforcement officers to be taking these kinds of liberties with endangered species.

The second point I want to make, Mr. Chairman, is that, also as part of the "sting" operation, Mr. McPartlin in his capacity offered for sale a number of gyrfalcons, some of which apparently were taken from the State of Alaska without officials of the State of Alaska having any knowledge of that taking and obviously without their authority or permits being issued for that taking.

If there is not a violation of law there—and I see that the possibility is that there is, by that taking in Alaska without State authority—then in fact it violated a Federal-State trust we all live under for those of us working with birds in the various States of the Nation.

Mr. Chairman, since the operation there were approximately 100-plus birds confiscated on June 29. Those have been held in

large part by the Service at their facility in Montana. We were told right from the beginning that none of the birds would be returned. In fact, some are beginning to be returned, but the remission proceedings have been incredibly slow.

Mr. Chairman, we are constantly concerned about the welfare of those birds, and we hope that the remission proceedings will pick up in speed so that their welfare is protected and the decision on individual birds will be made soon.

Mr. Chairman, I am going to bring up something else that was alluded to by Mr. Breaux this morning while Mr. Jantzen, the Director of the Fish and Wildlife Service, was presenting his testimony. And that was a document, Mr. Chairman, that I have in my hand that is called "Operation Falcon." And I have a package of these documents, Mr. Chairman, for every member of the committee, but because of the sensitive nature of this document, I would prefer to give it to you, Mr. Chairman, so that you can review and scrutinize those documents in camera. This was a document that was sent to the States, at least to these three States, Washington State, Idaho, and New York State. It got to Idaho on August 3, 1984. It had a "received" mark on it. But the importance of this is that it apparently is an internal document which reviews internally for the Service the allegations made by name, et cetera, of people involved. And the sensitivity is that there are some inaccuracies in there whereby people are named as defendants that were never charged, to our knowledge.

And finally, there is what I consider to be in the last section a really scurrilous attack, unfounded and unjustified, against the Peregrine Fund, which was represented by Dr. Burnham today. The only thing we can believe, Mr. Chairman, by the fact that it has been sent to three States, is that it has probably been sent to all 50 States, so that it sought to prejudice the State regulators against falconers.

Nevertheless, Mr. Chairman, I want to re-emphasize that the majority of falconers and raptor propagators work within the spirit and the intent of the law, all of the laws dealing with raptors. The falconry community, as Dr. Burnham has indicated, not only contributed birds, money, and time, but they pioneered some of the techniques for raptor propagation. And the fact is that we are interested in conservation. I think we have demonstrated, through our interest in this particular subspecies of bird—and obviously the technology goes to other birds in trouble—our interest in birds of prey generally.

And to test the 1978 exemption and to throw it out when in fact, Mr. Chairman, to my knowledge, not one single charge was made against any individual based on this exemption, I feel that it would be premature in the extreme for the Congress to consider amending the exemption at this time without a full opportunity in coming years to test it.

I am confident that, with the seamless marker that is the cornerstone of the efficacy of those regulations, the Congress, and particularly this committee, will find the middle road in terms of how you would approach any procedure to change the amendment, and that further, Mr. Chairman, my commitment is—and I gave it to Mr. Bavin this morning—that we will cooperate, we will meet, and we

are happy to join with the Service in any way whatsoever to curtail any illegal activities, not only if the potential for that were from a member of our association but also from any other.

Finally, Mr. Chairman, those few people who were indicted, charged, and convicted who were members of our association are being systematically removed from membership, as it is a policy of our bylaws.

Thank you, Mr. Chairman, and I appreciate the opportunity to make this statement.

Mr. Bosco. Thank you very much, Mr. Bond.

I would suggest, insofar as the testimony that you wanted to offer is concerned, that you send that individually to the members of the committee. I would prefer here to just take testimony that you would like to make public, because I think that would probably be of most benefit to the public.

Mr. BOND. Thank you, Mr. Chairman. I will do that.

[The prepared statement of Mr. Bond follows:]

**PREPARED STATEMENT OF FRANK M. BOND, ON BEHALF OF THE NORTH AMERICAN
FALCONERS ASSOCIATION**

INTRODUCTION

Mr. Chairman and members of the Committee, I am Frank M. Bond, an attorney from Santa Fe, New Mexico. I am here today to represent The North American Falconers Association, which is an international organization of falconers from the United States and Canada. We appreciate the opportunity to present testimony and request that our statement be printed in the proceedings of these hearings.

ENDANGERED SPECIES ACT

The North American Falconers Association appears today in support of H.R. 1027, the reauthorization of the Endangered Species Act ("Act"). 16 U.S.C. 1513 et seq. The Congress, in its wisdom and foresight, saw the need for legislation to protect and promote the welfare of flora and fauna which have been severely diminished because of the actions of man or by natural causes. Furthermore, the Congress has from time to time amended the Act to conform to biological reality and the needs of people working with endangered species.

We, obviously, are interested primarily in birds of prey, particularly the American peregrine falcon (*Falco peregrinus anatum*), which is the subspecies listed as endangered. Because of the difficulty of working with captive-bred peregrine falcons, we, along with other groups and individuals, proposed in 1978 an amendment which exempted these captive bred birds from certain portions of the Act. The 1978 exemption as passed by Congress amends Section 9(b) to read as follows:

(b) Species Held in Captivity or Controlled Environment.—

(2)(A) This section shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978; or

(ii) any progeny of any raptor described in clause (i); until such time as an such raptor or progeny is intentionally returned to a wild state.

(B) Any persons holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

We continue to support strongly the 1978 exemption, which was only recently implemented completely, because there are benefits from it to conservation efforts, science, and to recreational user of raptors.

1978 RAPTOR EXEMPTION

The record is clear that the Congress also intended to encourage raptor propagation by the exemption: "In order to encourage breeding of raptors in captivity, the domestic captive-produced progeny of raptors considered to be endangered, but legally taken from the wild after December 28, 1973, shall be considered for legal purposes in a like manner as the progeny of raptors captured before 1973. The Committee believes this will alleviate some of the human pressures on wild raptor population, will increase genetic diversity in captive populations and will further encourage captive production of raptors for conservation, recreation, scientific and breeding purposes." H.R. Rep. 1804, 95th Cong., 2d Sess. (1978) at 23.

Further, the Conference Committee expected that the exemption, like other provisions of the Act, would be implemented by appropriate regulation. H.R. Rep. 1804, 95th Cong., 2d Sess. (1978) at 24. The regulations, however, were not to duplicate similar regulations under the Migratory Bird Treaty Act (M.B.T.A.), 16 U.S.C. 703 et seq.

Prior to 1978, the U.S. Fish and Wildlife Service (Service) indicated its intent to draft and propose a set of captive breeding regulations. Although captive breeding of raptors had begun several years earlier, the individual breeder was only licensed by a Special Purpose Permit issued from the Service's Regional Division of Law Enforcement offices. The 1978 raptors exemption mandated the promulgation of captive breeding regulations. However, it was not until July 8, 1983 that the Service promulgated its rule to implement the raptor exemption. 48 Fed. Reg. 31607 (1983) (codified at 50 C.F.R. § 17.7). Simultaneously, the Service incorporated the raptor exemption into its regulation on Federal Falconry Standards (50 C.F.R. 21.29) at §§ 21.29(e)(2)(iv), (e)(3)(iii), and (e)(3)(v). These sections deal with the standards for the Master Class of falconer.

Also on July 8, 1983, the Service published its final rule on Raptor Propagation Permits, 48 Fed. Reg. 31608 (1983) (codified at 50 C.F.R. § 21.30). This rule had undergone extensive hearing and review by many interested parties. Under this rule commercial exchange of raptors was permitted, similar to many other avian species governed by the M.B.T.A. However, raptor propagation became the most tightly regulated of all propagation activities permitted under the M.B.T.A.

The Raptor Propagation rule came nearly five years after Congress passed the 1978 exemption. We are at a loss to explain why the Service delayed the rule, but it did work a hardship on the orderly implementation of the raptor exemption. In fact the rule did not become truly effective until the 1984 breeding season, because the required seamless leg marker was not produced until the Fall of 1983. And even in 1984, it was implemented only in a few states.

In sum, since the passage of the 1978 raptor exemption, we have had only the 1984 Spring breeding season under the rule. We believe that is hardly a test of its effectiveness.

As this Subcommittee will recall, the act was reauthorized in 1980. No one proposed then any modification to the raptor exemption. We might speculate that there was no move made, because the Division of Law Enforcement of the Service was taking its initial steps to carry out Operation Falcon.

OPERATION FALCON

On June 29, 1984, the Division of Law Enforcement of the Service revealed its Operation Falcon, a three year covert "sting" operation. A small percentage of the membership of The North American Falconers Association was searched, charged, or arrested for violations of wildlife laws dealing with birds of prey. Other people were charged who are not members of The North American Falconers Association. The Service's June 29 joint press release, by then Secretary of the Interior William Clark and then U.S. Attorney General William French Smith, claimed large scale black market dealings by falconers of hawks and falcons both in the United States and abroad. During the early morning raids on June 29, over 100 falcons and hawks were seized and approximately 30 people were arrested by Special Agents. Agents reported that none of the birds would ever be returned, but in fact some have and will be as individual owners are afforded their due process rights.

This Subcommittee must not be confused that Operation Falcon was necessary because there were abuses of the 1978 exemption to the Act; as far as we know, to date there are no charges against any defendant based on this exemption. As stated, the exemption had not been implemented. To date, Operation Falcon deals with violations which occurred prior to the implementation of the July 8, 1983 rules.

The allegations in the June 29, 1984 press release by Secretary Clark and Attorney General Smith have resulted in extreme harm to the membership of The North American Falconers Association. The allegations include the following:

Multimillion-dollar illegal black market in birds is a worldwide problem of serious proportions;

As many as 400 birds were illegally taken from the wild with many being offered for sale to buyers in the United States, Europe and the Middle East, where they were used primarily for falconry purposes;

Greatly concerned about the impact illegal trade is having on wild population of birds, converting a public trust to a private gain; and

A multimillion-dollar illegal market is threatening the existence of some species, and creating an incentive for organized activities.

After reviewing the indictments, affidavits in support of search warrants, Rule 11 statements (all public records), and Reports of Investigations (supplied by defendants), we find no evidence of a multimillion-dollar black market in the United States. In fact, prior to the black market ring set up by the Division of Law Enforcement, there appears to have been essentially no black market at all. The Service's agents in Operation Falcon were unable to buy any raptors in the United States.

Mr. Clark Bavin, Chief of the Division of Law Enforcement, at the Raptor Research Foundation meeting in Blacksburg, Virginia on October 26, 1984, confirmed that there is no evidence in public documents that 400 birds were taken from the wild during the period of Operation Falcon and offered for sale. Further, knowledgeable ornithologists find no justification for the statement that any North American raptors have been threatened by illegal harvesting during the period of Operation Falcon. In fact, because of control of pesticides, restocking the wild with captive-bred birds and other conservation efforts, much of it by falconers, the populations of peregrine falcons have increased greatly during this time. The allegation that an illegal market is threatening the existence of some species is unsubstantiated.

We respectfully request that this Subcommittee demand that the Service substantiate every allegation made. We fear that most accusations were exaggerated and, therefore, must be corrected by issuing a public announcement.

The National Audubon Society, through its spokesman, Amos Eno, also issued on June 29 a press release almost simultaneously with that of the Departments of Justice and Interior. National Audubon's press release expands and exaggerates further the allegations made by the Departments. Mr. Eno's release was most damaging to us because he alleged that the Service would seek felony indictments against over 50 falconers, including many of the most prominent leaders of the national falconry association (sic). No leader or officer of The North American Falconers Association was arrested, so Mr. Eno's accusation is unfounded. Mr. Eno admitted during a telephone interview with Alaska Public Radio that some of the numbers used in the Audubon release were basically his own estimates.

The North American Falconers Association does not condone illegal activities by any of its members. Those persons convicted who are members are being systematically removed or suspended from membership by the Board of Directors.

The North American Falconers Association expects a systematic, even, fair and continuous enforcement of the wildlife laws. It appears to us that the Division of Law Enforcement virtually suspended enforcement for three years so that the "sting" operation could thrive. The "sting" operative was reported to state and federal authorities on at least three occasions by our members, but, obviously, no action was taken against him. This type of action causes us to consider whether the Division of Law Enforcement did not in fact create the majority of illegal activities of the type they sought to uncover.

We ask this Subcommittee to balance whether "sting" type operations comport with enforcing the Endangered Species Act when compared to efficient, continuous law enforcement. What was the cost of Operation Falcon? This Subcommittee should require the Service to consider the following in arriving at a gross figure:

1. Biological impact on the natural resource and the justification for the taking and use of wild peregrine falcons and gyrfalcons in the "sting" part of Operation Falcon;

2. Costs for the "sting" part of Operation Falcon;

3. Costs for the investigation, indictment, search, arrest, trials, and settlements of the cases;

4. Costs for the remission proceeding for the confiscated birds; and,

5. Costs for the transport, housing, maintenance and veterinary care associated with the confiscated birds.

The National Audubon Society, the Service, and others were very concerned by the adoption of the 1978 exemption, arguing that it would enable unscrupulous

people to defy the spirit and intent of the Act. They would have had every right to be concerned had they foreseen a suspension of the enforcement mechanism available generally under the M.B.T.A. and specifically 50 C.F.R. § 21.27 (Special Purpose Permit), § 21.28 (Falconry Permits), and § 21.29 (Federal Falconry Standards). We question whether the Service did not purposely suspend enforcement in order to prove their point, thereby discrediting the proponents of the 1978 exemption by means of Operation Falcon. While it displeases us to even consider such a possibility, we do know that no one who supported the raptor exemption ever considered or suggested such a "de facto" disregard for the resource. We do not take lightly the gutting of M.B.T.A., since it is under that authority we are granted the privilege of engaging in falconry.

The North American Falconers Association is incensed that Law Enforcement officials and its "sting" operative engaged in the apparent illegal taking of raptors from the wild to use in Operation Falcon. On May 18-19, 1984, "sting" operative John Jeffrey McPartlin, Great Falls, Montana, a previously convicted trafficker in birds of prey, and the Service's Law Enforcement agent, John Gavitt, joined two target falconers at Lake Powell, Utah to take three eggs from a pair of anatum peregrine falcons. McPartlin, with one falconer, directed the operations while Special Agent Gavitt and the other falconer climbed the cliff from which the eggs were taken. Gavitt tended the safety rope as the falconer descended the cliff to reach the eyrie. Gavitt lifted the eggs by rope to the top of the cliff. Although the eggs were viable, only one was hatched successfully by McPartlin a few days later.

We find nothing in the Endangered Species Act nor in its regulations which permits such an operation for law enforcement purposes. That being the case, McPartlin's and Gavitt's activities should be thoroughly investigated and appropriate sanctions imposed.

Further, McPartlin and agents arranged for the taking of gyrfalcons in Alaska without authority from the officials of the State. The birds were used to "sting" various individuals. Without evidence of taking and transfer permits from Alaska, they also seem to have violated several wildlife laws. At the very least, these actions violated the federal/state trust between the Service and Alaska.

While almost all of the people arrested were charged with multiple felonies, nearly all pled guilty in plea bargains in which the charges were reduced to misdemeanors. Many of those who accepted the plea bargains did so because of the potential jeopardy to their careers from a felony conviction. Others accepted plea bargains because they could not afford the high cost of a legal defense. As of now, three people have gone to trial. One of the three defendants who pled not guilty was convicted and has appealed. The two others were tried and acquitted, successfully using a defense of entrapment. These were the first two successful entrapment defenses in the history of the Service's law enforcement operations, according to Law Enforcement Chief Clark Bavin. Apparently the entrapment defenses were successful because the "sting" operative, McPartlin, was extremely aggressive in pursuing his targets.

The Division of Law Enforcement threatens indictment of many more people. To date there has not been an arrest for illegal purchases or sales of raptors independent of the few people McPartlin set up. Meanwhile, in an incredibly slow process, remission proceedings are progressing for birds which were confiscated from owners who were not formally charged. We continue to be concerned about the health and welfare of the birds held by the Service, since we believe the birds are being held in substandard conditions.

The Service also produced an undated and unsigned summary document of its actions entitled, "Operation Falcon," which because of the way it presents the data, smears by innuendo many U.S. falconers and raptor propagators. We suggest that the members of this Subcommittee review this document in camera, as we do not wish it to be printed as part of the proceedings, because that would further damage these people. We believe this document was sent to most, if not all, state law enforcement agencies with the apparent intention of prejudicing falconers and raptor propagators in the eyes of state regulators.

The document includes such things as a list of occupations of people purportedly arrested and listed as defendants, but in fact, some were not. Defendants and suspects are interchanged freely so as to confuse the reader as to how many people have been arrested. There is a listing of the birds involved, but without relation to the individuals charged or violations of law or even the country where the birds were taken. It includes a series of statements out of context and without reference to a particular case, including one from an individual who was acquitted. The final part is a particularly savage and scurrilous attack on the Peregrine Fund, an internationally recognized conservation organization with its headquarters at Cornell

University. The Peregrine Fund, with the cooperation of many American falconers, has produced more peregrine falcons for reintroduction purposes than any other organization in the world. There are numerous hearsay allegations against the leadership of the Peregrine Fund when, in fact, no one affiliated with the Peregrine Fund has been charged with any wrongdoing. This Subcommittee should see that action is taken to censure and reprimand the author of this damaging document.

The North American Falconers Association believes that the Service through its convert Operation Falcon and by its suspension of enforcement for the better part of four years not only encouraged, but also participated in the misuse of wildlife. In addition, the June 29, 1984 press release particularly damaging to The North American Falconers Association membership because it represents an unjustified, broad brush condemnation of all American falconers.

CONCLUSION

The 1978 exemption to the Act must be considered in the cold, dispassionate reality of the circumstances. Although a very few individuals engaged in wrongful and illegal activities, the overwhelming majority of raptor breeders, falconers and others who work with birds of prey do so with respect for the letter and the spirit of the law. Thus, we seek from the Service a retraction and an apology to the American falconry community generally and specifically, to those individuals wrongfully implicated in the document, "Operation Falcon."

Without the motivation, knowledge and hard work of American falconers, the captive propagation of peregrine falcons and other species would have been doomed to failure. The falconry community has been, in most cases, the driving force behind the protection and recovery efforts for many species. Many falconers have donated birds, time and money for this important conservation work. Despite Operation Falcon's attack, most falconers will continue these laudable efforts.

The North American Falconers Association believes it is important to continue to test the efficacy of the 1978 exemption. The exemption makes it possible to transfer birds with some restriction among individuals for conservation, scientific and recreational purposes. The development of the new seamless marker for birds held for commercial purposes will surely stem most of the illegal activity. This new marker replaces the old cable-tie, plastic marker, which the Service itself admitted wears out, breaks, and is not tamper proof. 48 Fed. Reg. 31606 (1983). Further, we are in the process of developing more sophisticated biological methods of identifying individual birds.

Under the captive propagation regulations, raptor breeders and falconers are the most highly regulated and restricted of all the people working under the authority of the Endangered Species Act and the Migratory Bird Treaty Act. If the Service will maintain effective, fair and continuous enforcement of the laws, we expect to see a drop in the amount of wrongdoing by those few who might consider violating the law.

Finally, The North American Falconers Association believes strongly that to abandon the exemption after only a single year of full implementation would be premature in the extreme, especially since it has been implemented only in a few states thus far. The benefits of the exemption will manifest themselves as the American falconry and raptor propagation community have an opportunity to use it in the coming years.

Operation Falcon does not demonstrate in any manner that falconry and raptor propagation are an evil to be wiped away any more than Operation Trophykill, another Service "sting" operation, demonstrates that hunting is bad. Congress must continue to find the reasonable middle ground as it has with this 1978 exemption.

The North American Falconers Association will continue to seek better communications with the Fish and Wildlife Service, particularly the Law Enforcement Division. We feel every attempt must be made to transform the Law Enforcement Division's adversarial, anti-falconry attitude into one of cooperation and understanding. We stand ready to cooperate where we can to assist the Service in the wise management of birds of prey and falconry.

Thank you.

Mr. Bosco. The last witness is Mr. Ron Lambertson, the Associate Director of Wildlife Resources for the U.S. Fish and Wildlife Service.

STATEMENT OF RON LAMBERTSON

Mr. LAMBERTSON. Thank you, Mr. Chairman.

With your permission, I have a lengthy statement that I would like to present for the record and merely summarize it at this time.

Mr. Chairman, I appreciate the opportunity to appear before the committee today. More than 5 years ago the Fish and Wildlife Service began collecting information on the illegal commercialization of federally protected birds of prey. By 1981 it became apparent that a thriving illicit market existed worldwide. In response, the Service initiated "Operation Falcon," a covert investigation which you have heard about in some detail.

During the 3 years of the operation, several hundred individuals were contacted, and many were implicated in various Federal wildlife violations. The scope of the investigation grew to include subjects from Canada and Europe, with ties to the Middle East.

Finally, as was mentioned earlier, on June 29, 1984, the Fish and Wildlife Service executed over 70 arrests and search warrants. Simultaneously, Canadian wildlife officials also served 15 warrants. The current count is that, of 48 individuals who have been charged, 37 have been convicted, 2 have been acquitted, 8—all foreign nationals—are fugitives, and 2 are awaiting trial, including 1 already acquitted on other charges. The sentences imposed to date include \$220,625 in fines, 2 years incarceration, over 42 years probation, and over 1,200 hours of community service.

At the current time the investigation is continuing on several fronts. Canadian wildlife officials issued 19 arrest warrants as recently as February 18, 1985, and announced that they have corroborated the existence of a multimillion-dollar international black market in raptors, a fact that was announced earlier by the Fish and Wildlife Service. Additional charges are expected to be filed here soon.

In conclusion, Operation Falcon demonstrates the Service's commitment to effective management and enforcement of the raptor resource, a commitment that is shared by wildlife authorities elsewhere.

Mr. Chairman, that completes my very brief summary and I would be ready for questions.

[The prepared statement of Mr. Lambertson follows:]

PREPARED STATEMENT OF RONALD E. LAMBERTSON, ASSOCIATE DIRECTOR, WILDLIFE RESOURCES, DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today to discuss the ongoing criminal investigation being conducted by the U.S. Fish and Wildlife Service called "Operation Falcon."

First, let me summarize the Federal role in protecting birds of prey. The prohibitions applicable to activities involving migratory birds are found in the Migratory Bird Treaty Act, enacted in 1918 to implement the 1916 Canadian migratory bird treaty, but which now incorporates by reference similar treaties subsequently ratified with Mexico, Japan, and the Soviet Union. These prohibitions are comprehensive and nearly absolute. Prohibitions against taking, possession, barter, and sale for instance apply to all birds deemed migratory under the terms of the various treaties, unless the Secretary of the Interior approves regulations to authorize such acts. The general thrust of the Migratory Bird Treaty Act, therefore, is to prohibit all activities involving migratory birds that are not authorized by regulation.

Raptors such as falcons and hawks first received protection under the Migratory Bird Treaty Act during March 1972 when the treaty with Mexico was amended to include 32 additional families of migratory birds.

Two particular raptor species, the American peregrine falcon and the Arctic peregrine falcon, however, acquired limited Federal protection before 1972. Both were listed as endangered under the Endangered Species Conservation Act of 1969 and retained that listing under the Endangered Species Act of 1973 until recently. Now the Arctic peregrine falcon has been reclassified as a threatened species, while the American peregrine falcon continues to be listed as endangered, but in addition all subspecies of peregrine falcons found in the wild in the contiguous 48 States are listed as endangered under the similarity of appearance provisions of the Endangered Species Act of 1973 because they are virtually indistinguishable from each other. As a result, peregrine falcons are protected by both the Migratory Bird Treaty Act and the Endangered Species Act of 1973.

Since the onset of comprehensive Federal protection for raptors in 1972, by regulation the Service has authorized falconers to engage in the sport of falconry as both a traditional and legitimate use of the resource. A falconry permit, most often issued jointly by the Service and the falconer's State wildlife agency, authorizes activities integral to the sport, such as the taking, possession, and transportation of raptors. Today, 42 States are part of a joint State-Federal falconry permit program. At last count, there were over 2,200 licensed falconers.

Similarly, since 1972 the Service has by regulation permitted raptor propagation or captive breeding of raptors, but unlike falconry, which has been practiced for centuries, propagation is a recent phenomenon with relatively fewer participants. Until several decades ago, raptors were bred in captivity only as the result of accidental or opportunistic mating. During the 1960's, successful propagation techniques were developed for a number of species, most notably the peregrine falcon. Since that time, captive production has increased substantially and captive produced offspring are used as a source of stock to bolster or restore wild populations and, even more recently, as a source of birds for falconry. Today there are between 150 and 200 Federal raptor propagation permits outstanding.

Throughout the evolution of Federal protection for raptors, the peregrine falcon has received considerable attention. In 1978, the Endangered Species Act of 1973 was amended to "exempt" peregrine falcons from the Act's prohibitions if the particular bird in question was held in captivity or a controlled environment on November 10, 1978, or is the offspring of such a bird. The expressed purpose of the exemption was to alleviate some of the human pressures on wild raptors, to increase genetic diversity in captive populations, and to further encourage captive production of raptors for conservation, recreation, scientific, and breeding uses.

Whether to allow the sale of these captive-bred raptors was an issue that surfaced early, but was not resolved until recently. During 1976, when promulgating the falconry regulations, the Service specifically noted that a decision on whether to allow the sale of captive-bred raptors would be addressed in the future. In late 1981, the Service was requested to initiate agency action to allow the sale of captive-bred raptors under the Migratory Bird Treaty Act. During 1983 the Service proposed and adopted new standards for raptor breeding that authorize raptor propagators to purchase, sell, or barter captive-bred raptor, including peregrine falcons exempt under the Endangered Species Act, but only when the birds are banded with a numbered seamless leg marker supplied by the Service. Propagators may sell these birds to each other or to U.S. falconers authorized to purchase such raptors.

Both the Federal falconry and raptor propagation contain detailed banding, recordkeeping, and reporting requirements in an attempt to insure compliance with limitations placed on taking raptors from the wild, as well as with prohibitions on the sale or purchase of such birds.

Those persons keeping protected raptors under these permits are required to identify each raptor with one of three varieties of uniquely numbered markers (bands) supplied by the Service: (1) a black, adjustable marker for birds taken from the wild; (2) a yellow, adjustable marker for captive-bred birds; or (3) a seamless leg marker affixed to captive bred birds that are eligible for sale.

The use of these markers is strictly regulated. Markers may not be removed and transferred to another bird, or reused if a bird dies. When a marker is placed on a raptor, the permit holder must file a written report with the Service and identify the marker number, species of bird, date banded, location, age (if known), and sex (if known). In effect, a marker serves to register a lawfully acquired raptor with the Service.

To fulfill its law enforcement responsibilities for raptors, the Service has used a variety of techniques to monitor the activities of falconers, propagators, and others who use this resource. Agents conducted surveillance of active nests to attempt to identify and apprehend individuals taking eggs or birds from them illegally. Customs officers and Service personnel worked closely in an effort to interdict illegal

imports and exports of raptors. The Service provided training for State officers and assisted individual States in developing a program of enforcement. Limited local undercover operations using Service agents as operatives were tried. All of these methods have worked over the years and some violators have been apprehended and prosecuted as a result.

One specific example stands out. A few years ago airline employees in Fairbanks, Alaska, became suspicious when they noticed a small dog being shipped in a large animal crate. These employees notified Service agents who discovered four young peregrine falcons hidden in a false compartment in the crate. The owner of the crate was arrested and charged with unlawful possession of endangered species after admitting that the birds had been illegally taken from the wild on the Yukon River. The defendant pled guilty, was fined \$8,000 and placed on five years probation.

While these enforcement techniques were successful in identifying and prosecuting some illegal activity, intelligence sources indicated that a significant volume of illegal traffic was continuing and the price of illegal birds had skyrocketed. For instance, a prominent raptor propagator stated that the price of peregrine falcons in illicit trade had jumped from hundreds to thousands of dollars per bird, while the price of gyrfalcons (an uncommon, but not endangered raptor) skyrocketed from thousands to tens-of-thousands of dollars per bird.

In recent years, the Service has become increasingly reliant on undercover operations because this technique is extremely successful in dealing with wildlife violations that cannot be detected through patrol-type enforcement. Conspiracy, fraud, and smuggling are as much a part of wildlife violations today as is poaching. The courts and Congress both have recognized the legitimate need for sting-type investigations and have laid down guidelines for investigative agencies to follow. Attorneys from the Department of Justice routinely assist the Service in the planning stages of undercover investigations such as "Operation Falcon" and continue to provide advice as the investigation progresses.

Therefore, in response to information from various sources about the magnitude of illicit trade, "Operation Falcon" was initiated during the spring of 1981. This covert investigation was conducted by the Service with the cooperation of a falconer, Mr. McPartlin from Great Falls, Montana. Mr. McPartlin, who has been a falconer for most of his life and has a reputation within the falconry community as an expert bird trapper assumed the role of a raptor dealer. His role appeared authentic because of a 1972 Federal conviction for a misdemeanor wildlife violation involving the unlawful transportation of raptors protected under Wyoming law. Mr. McPartlin pled guilty and paid a \$200 fine.

With that background, let me now concentrate on the details of "Operation Falcon." During the three years of this operation, Mr. McPartlin had contact with several hundred individuals. Hundreds of tape recordings were made of conversations with those individuals and many contained incriminating statements or new leads. The activities of Mr. McPartlin were closely monitored and supervised by Special Agents of the Service throughout the investigation.

After three years, the Service decided to end the covert portion of the investigation, initiate prosecutions, and continue further overt investigation. It was obvious that if the undercover operation continued many more suspects would be identified, but the operation had grown so large that a major job lay ahead to prosecute those already incriminated.

A decision also was made to conclude the investigation by simultaneously executing warrants nationwide, primarily to secure documents and prevent the loss or destruction of evidence. Elaborate preparations for this operation were begun in the spring of 1984. A special pre-raid training program was held for agents leading each raid team. During this training session case reports were reviewed and agents were given refresher courses in raptor handling. A special holding facility was built to care for seized birds. The goal was to insure that these efforts were safe and efficient.

On June 29, 1984, while the Attorney General and the Secretary of the Interior announced the operation, 32 individuals were arrested in the United States and Canada as 300 Federal, State and Provincial wildlife officers staged simultaneous raids in 14 States and four Provinces of Canada. In addition, over 40 search warrants were served and over 60 individuals interviewed concerning illegal activities. Agents seized 106 live and 20 dead raptors, six raptor eggs, six pickup trucks, three cars, and one aircraft, three incubators, 11 raptor bands, five pounds of marijuana, and \$3,100 in counterfeit bills. The indictments outstanding charged 37 individuals with 438 violations of various Federal statutes, including charges involving the Lacey Act Amendments of 1981, the Endangered Species Act, the Migratory Bird

Treaty Act, conspiracy, smuggling, filing false statements in an attempt to defraud the government, and mail fraud.

In the eight months since then, the investigation has continued. Agents have interviewed scores of individuals and pored over boxes of correspondence and documents. Many people, including some falconers, have come forward with new information and even offered to work with the Service in future undercover activities. Government agencies in foreign countries, including Canada, Iceland, the Federal Republic of Germany, Australia, the United Kingdom, France, Norway, Denmark, and Zimbabwe, have shown an intense interest in the case. In December 1984, representatives from six of these countries and the United States met in London to share information relating to illegal trafficking in raptors. Interestingly, much of the information collected by one country was often corroborated by another. Further meetings are expected to occur as they are needed.

Of the 48 individuals criminally charged in the United States so far, 37 have been convicted, two were acquitted and eight (all foreign nationals) are fugitives. The sentences imposed to date are: \$220,625 in fines, two years incarceration, over 42 years probation, and over 1,200 hours of community service. Two individuals were each fined \$30,000. Another individual was fined \$10,000 and sentenced to the Federal penitentiary for one year, and in addition, since he was on probation from an earlier violation of a similar nature, was sentenced to prison for an additional six months upon revocation of his probation. That individual began serving an 18-month term in the Federal prison at Leavenworth, Kansas, on October 15, 1984.

Most of the violations fall into three categories: (1) illegal taking of birds from the wild, and the illegal possession, transportation, sale or purchase of these birds; (2) the manipulation of Federal bands and the falsification of records to conceal or thwart detection of birds unlawfully taken from the wild or otherwise unlawfully acquired, in some cases by claiming the birds were captive-bred when in fact they were taken from the wild; and (3) outright smuggling of birds into and out of the United States. The following completed cases illustrate these techniques.

One individual contacted Mr. McPartlin about obtaining a gyrfalcon. When Mr. McPartlin said one was available, the subject came to Montana with a band from a captive bred gyrfalcon that had died. He then placed the band on a wild caught gyrfalcon and transported it back to his home.

In one case a subject took two goshawks illegally from the wild in Montana in the presence of a Service agent and Mr. McPartlin. The goshawks then were transported to Illinois and documents were submitted to the Service claiming that the goshawks had been bred in captivity in order to receive bands to conceal the true and illegal origin of the birds.

In yet another case, an individual told Mr. McPartlin he would like to buy a wild caught gyrfalcon and peregrine falcon. He later illegally purchased a gyrfalcon from Mr. McPartlin, took it to his home in another State and filed a report with the Service that he had trapped it legally.

One individual removed a band from a dead gyrfalcon and, after illegally receiving a gyrfalcon from Mr. McPartlin, placed the band on the newly acquired bird and transported it from Montana to Illinois. Soon thereafter, a second person traveled from Illinois to Montana, received another gyrfalcon from Mr. McPartlin and placed the same band used earlier on this gyrfalcon. Documents submitted to the Service still claimed that the original bird had never died. This one band was used on three gyrfalcons, including one which was smuggled into Canada and sold there.

In still another case, an individual purchased five endangered peregrine falcons and one goshawk, all smuggled into the United States from Canada. The purchaser then had someone else place captive-bred bands on four of the five peregrine falcons and the goshawk. Subsequently, the birds were illegally transported from Montana to Utah.

These are just some of the examples of illegal taking, band manipulation, and smuggling uncovered by "Operation Falcon." In addition, "Operation Falcon" uncovered a large illegal international traffic in raptors. Here are some examples of completed cases:

In one case, an individual was convicted of a Federal wildlife violation that involved smuggling 14 Finnish goshawk eggs into the United States from West Germany. He strapped the eggs to his body to keep them warm as well as to conceal them from U.S. Customs inspectors. Once the eggs were in the United States, he placed them in a raptor breeding facility operated by another person, who agreed to falsify his records and report to the Service that the eggs were laid by goshawks in his breeding facility. The plan to sell the hatched birds for up to \$5,000 a pair was foiled, however, when the birds were seized on June 29, 1984. For this and other violations the smuggler was fined \$30,000 and sentenced to four months in jail.

In another case, a Canadian admitted to the Service that he and a partner trapped endangered peregrine falcons and gyrfalcons and laundered them through their Canadian breeding project by falsely claiming them as captive-bred. The false claim was necessary to obtain the appropriate Canadian export permits. Most of these falcons were sold in the Middle East, but several were smuggled into the United States. During 1982 and 1983 his operation alone is estimated to have grossed over \$700,000 (U.S.) in sales of illegally taken falcons.

Cooperation between U.S. and Canadian wildlife authorities has been outstanding during this investigation. As a result, four Canadians were indicted in the United States and one Canadian was arrested here on the day of the raid. Canadian officials executed 17 search warrants in Ontario, British Columbia, and the Yukon on June 29, 1984, and have shared their findings. On February 18, 1985, as the result of a continuing Canadian investigation, Ontario wildlife officials issued nine arrest warrants for individuals from Ontario, Quebec, Nevada, Pennsylvania, the United Kingdom, and Finland. On the same day Royal Canadian Mounted Police officers in the Yukon Territory issued warrants for the arrest of ten people in Alberta, British Columbia and the Yukon, including two operators of the largest game farm in the Yukon and a senior government wildlife biologist in charge of banding falcons granting export permits for the territory.

A total of 48 felony charges resulted under Canadian law, including conspiracy to import and export birds without the proper permits, false representations in an application for an export permit, aiding an individual to ship birds illegally into or out of Canada, and importing birds of prey without an import permit.

Canadian investigators found a lucrative international market in raptors, with purchasers located in the Middle East, the United States, the United Kingdom, West Germany, and Japan. Their investigation revealed that birds originated from the wild in Canada, the United States and Finland. The species involved included gyrfalcons, peregrine falcons, Finnish goshawks, prairie falcons, and Harris hawks. In some cases, the birds were smuggled into Canada before being shipped to their final markets.

As a result, Canadian investigators issued a press release on February 18, 1985, to announce that they have independently verified the existence of a multi-million dollar international black market, a fact the Service made public in its June 29 news release. In addition, the Canadians have established that the birds involved have come from even more international sources and have gone to even more international destinations than previously thought.

But even in the face of "Operation Falcon" illegal international trafficking continues. In late 1984, a shipment of ten illegal endangered peregrine falcons was seized in the Netherlands while enroute from Mexico City to Abu Dhabi, Saudi Arabia.

Of course, an investigation of this magnitude has its critics. First, there is some concern that the government, by offering gyrfalcons and peregrine falcons for sale or trade, engaged in entrapment. Agents of the Service have been extensively trained to avoid entrapment and this entire investigation has been monitored by the Department of Justice. Conversations were tape recorded so there would be no question as to what was said. Keep in mind that the courts have ruled consistently that individuals predisposed to violate the law who are provided with an opportunity to do so are not entrapped.

Concern has also been expressed that the government trapped birds from the wild to use in this operation. The Service did take 36 gyrfalcons, three prairie falcons, and three North American goshawks, a total of 42 birds. No endangered falcons were taken from the wild by the Service. The investigation documents as many as 500-600 raptors that were involved in illegal traffic and perhaps substantially more may be revealed, and the Service believes that the small number taken from the wild to conduct this operation is completely justified. In addition, the deterrent effect of this operation should save many more birds in the future.

In our opinion "Operation Falcon" has been highly successful in identifying widespread illegal activity involving raptors. The significant penalties imposed so far indicate that the courts consider the protection of our raptor resource to be a serious matter. We believe that these penalties and the fact that the Service is ready and willing to enforce the law will deter others from committing such violations in the future.

Through "Operation Falcon" the Service has identified some regulatory problems. Among other things, we may need to look at recordkeeping, reporting, and banding requirements. The Secretary of the Interior has charged the Service to review the existing regulatory mechanism and make any necessary changes. That review is underway. On January 4, 1985, the Service published a notice in the Federal Register

of its intent to review the Federal raptor regulations and solicited public comments. The public comment period has been extended to June 4, 1985.

I am encouraged by the fact that individuals are coming forward on almost a daily basis willing to assist us. The Service has a responsibility to conserve the raptor resource in the wild. "Operation Falcon" was not intended to discourage captive breeding of raptors or discredit the sport of falconry.

In conclusion, I would like to thank the Chairman and the members of the Subcommittee for your kind attention and consideration of our views. The Service welcomes any suggestions you or the public may have to improve our law enforcement efforts. We all share a common goal—to continue the beneficial use of raptors within a framework that will insure their conservation. Thank you.

Mr. Bosco. Thank you very much, Mr. Lambertson.

I wanted to ask Dr. Burnham what he thinks of Mr. Leape's proposal that the raptor exemption be eliminated by Congress. Do you think that would have a substantial effect on preserving the species?

Dr. BURNHAM. No, I don't. As I mentioned, the real problem for the peregrine falcon has been DDT as far as its dramatic decline.

The removal of the exemption, I think, would discourage captive propagation by some propagators. It would tend to reduce the total captive population, which would be unfortunate. I know that the machinery seems to be well and functioning. It doesn't seem to be broken. I don't think it really needs to be fixed at this point in time.

Mr. Bosco. I guess the theory here is that it would allow those falcons to remain in the wild and that people would not be able to take them at least across state lines to propagate them. You feel that that would not have any effect?

Dr. BURNHAM. I think there is already adequate protection under the Migratory Bird Treaty Act and the Lacey Act. There seems to be plenty of protection that is already in existence. I don't think eliminating that inclusion would add anything that will have a positive effect on the recovery effort—any type of positive effect at least.

Mr. Bosco. Mr. Lambertson, could you comment on that?

Mr. LAMBERTSON. Mr. Chairman, we have been very concerned about the outcome of Operation Falcon. As a result, we have announced to the public in the Federal Register that we are going to undertake a comprehensive review of all the raptor propagation regulations we currently have in effect. We have extended the comment period until early June. We have requested public comment on this.

Our big dilemma is that a lot of the cases are still pending. We have cases that have not yet been delivered to the U.S. attorney's office. Therefore, we are limited in the extent that we can complete an analysis of the cases and the actual violations that have occurred.

We do have concerns. Because of those concerns, we went to the Federal Register and we will be undertaking that review. Unfortunately, it will probably not be completed in time for the Congress to have that information in considering reauthorization of the Endangered Species Act.

Mr. Bosco. Thank you. Mr. Bond, am I correct in assuming that your organization would support such an exemption as is now in the law?

Mr. BOND. Yes, we do, Mr. Chairman.

Mr. Bosco. All right, I think with that I am going to conclude the hearing.

I want to thank this panel. That again was very informative and thank you all for your work in the preservation of falcons and hopefully we can take into account your testimony when we are re-authorizing the Act.

With that, I would like to thank everyone here and we will call this hearing to an end.

[Whereupon, at 2:35 p.m., the subcommittee was adjourned.]

[The following was received for the record:]

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation appreciates this opportunity to comment on the Endangered Species Act. Farm Bureau is the nation's largest general farm organization with a membership exceeding three million member families in 48 states and Puerto Rico.

Endangered species recovery has two fundamental components: identification of new populations and protection of known populations. Endangered species legislation should, within reason, promote both aspects. Since 1973, however, the Endangered Species Act has focused exclusively on providing penalties for interference with known populations. This negative enforcement mechanism not only ignores the basic need for identification of new populations, but also been applied without regard to the legitimate property interests of farmers and ranchers.

Many currently listed species are present on or near private property in rural areas, creating a disproportionate impact on the agricultural community. Enlisting the voluntary cooperation of farmers and ranchers is therefore essential in both locating new populations and protecting known ones. Moreover, a reward system of a one-time cash payment is not an adequate incentive.

To provide an incentive for farmers and ranchers to report endangered species sightings and locations, new legislation should provide: (a) That any species so reported will be relocated to federal or state lands where they will not interfere with the property interests of farmers and ranchers; and (b) If this is not possible, the federal or state government should compensate the landowner by purchase of an easement over the affected property at such a price so as to provide an incentive for reporting.

While the enjoyment and recovery of endangered species is supposed to be for the benefit of the general public, farmers and ranchers often bear a disproportionate cost for species maintenance. This is especially true where the endangered species is a predator (i.e., gray wolf or grizzly bear) that threatens crops and livestock. Under present law, agriculture has no recourse for damages caused by endangered species.

The Endangered Species Act must be amended to compensate farmers and ranchers who suffer crop and livestock losses due to endangered species. As a public resource, these species must be maintained by the public as a whole, not by the agricultural community.

The Act as amended must make provision either for: (a) Prompt removal of the offending species and indemnification for damage caused by that species; or (b) Allow the affected landowner to "take" an endangered species that is causing damage to crops and/or livestock.

Although "critical habitat" is currently supposed to be designated whenever practicable, in practice it has been designated in very few cases. Farmers and ranchers are often prohibited from conducting certain practices on their land on the off-chance that an endangered species might be present, even though such property is not designated "critical habitat." For example, farmers and ranchers of over nearly 500 million acres of Western land that are infested with prairie dogs are restricted in the way they can control these destructive rodents because of the slight chance that the endangered black-footed ferret might be found. Restrictions of this type unduly burden agriculture at the expense of remotely marginal benefits, and also erode the spirit of cooperation with the farmers and ranchers that is necessary to achieve endangered species recovery.

We recommended that endangered species legislation should:

(a) Require designation of critical habitat for every listed species;

(b) Define as "critical habitat" in terms of current range and not historical range. "Current range" is only that area where the species is known to be present or has been sighted within the past 5 years;

(c) Restrictions concerning land use for maintenance of possible habitat should apply only to areas designated as "critical habitat;"

(d) Critical habitat should contain the smallest area, based upon verified scientific information, necessary to sustain a viable population; and

(e) Where private land is designated "critical habitat," compensation should be provided to the landowner for any loss of use sustained thereby.

Of growing concern to farmers and ranchers are programs, such as the Wolf Program, in Idaho, where endangered species are introduced in new areas to promote recovery. Such programs cause new and sometimes substantial damages to unsuspecting area residents.

With regard to such programs, the Act should be amended as follows: (a) Strict liability of the federal governments and indemnification for losses incurred by area landowners; (b) no such program shall be implemented without approval of affected state and local governments, nor without a full public hearing in the affected area; and (c) introduced species shall be located and confined to federal or state property.

Amendments to the Act must recognize and balance the concerns of private industry and presentation of endangered species. Current law, bolstered by Supreme Court decisions, focuses only on species preservation without regard to cost. This approach may have achieved marginal benefits in certain species preservation, but at the heavy cost of alienating farmers and ranchers, as well as others, from pursuing the goals of species recovery. The legislation should be amended to balance the risks and benefits of any listing, and to recognize agricultural concerns so as to resolve conflict in a way that is beneficial to both the species and to agricultural interests.

The Act should be amended as follows:

(a) Listing proposals should contain risk/benefit analysis;

(b) Listing proposals should indicate the amount of habitat and the number of species necessary for recovery. The Act should provide that any additional populations either be relocated to the designated habitat or not be subject to the taking penalties;

(c) Prior to listing, state and federal officials should solicit affected persons or organizations to identify possible areas of conflict between land use and species recovery, and to reach agreement on how to achieve the goals of both;

(d) Current law provides that in consultations between federal agencies and the Fish and Wildlife Service (FWS), the agencies may not take any action which FWS determines would jeopardize a listed species. The Act should be amended to also provide that an agency may not take any action in furtherance of preservation that is greater than what FWS determines is appropriate to preserve the species;

(e) The definition of "taking" and determinations of "jeopardy" should include only those activities causing physical harm to species; and

(f) Listing proposals should identify and consider, in addition to a risk/benefit analysis, mitigation measures that will avoid conflicts between recovery and the activities in an affected area.

Better communication between FWS and the agricultural community is necessary to foster the mutual cooperation that is essential to further the goals of each. While not a legislative matter, such communication is vital to implementation of the Act. Farm Bureau is available to facilitate such communication.

Thank you for the opportunity to present our views. Your careful consideration of these views will be most appreciated.

SUPPLEMENTAL STATEMENT OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API) is pleased to submit this statement for the record on H.R. 1027, the Reauthorization of the Endangered Species Act (ESA). This statement supplements API's testimony presented during the Subcommittee's hearings on March 14, 1985. In this statement, we will address three items: incidental taking permits; incidental taking and the Marine Mammals Protection Act; and experimental populations.

API is a national trade association with 230 companies and over 6,000 individual members engaged in all phases of the oil and gas industry. Many of our members must frequently respond to the requirements of the ESA and, as a result, are keenly interested in the Subcommittee's deliberations on the ESA.

INCIDENTAL TAKING PERMITS

One of the key features of the ESA is "taking." "Taking" is defined as: to harass, harm, pursue, hunt, shoot, wound, kill, take, capture, collect, or to attempt to engage in such conduct. Before 1982, Section 9 prohibited "taking" of a protected

species in nearly all instances. There were only a few exceptions to this prohibition which were related to scientific matters.

However, in 1982 Congress amended the ESA by refining the concept of "incidental taking," i.e., in specific situations, "taking" of a species "incidental" to otherwise lawful activities was permitted. Unfortunately, the 1982 amendments created two separate standards for the applicant. Currently, for projects involving Federal actions a Section 7 consultation is required. In this situation, an incidental taking permit applies if: (1) the incidental taking will not jeopardize the continued existence of the listed species and (2) the applicant complies with "reasonable and prudent measures" specified by either the Secretary of the Interior or Secretary of Commerce to minimize or avoid adverse effects of incidental taking. For all other activities that do not require Section 7 consultations, Section 10(a) of the ESA authorizes the Secretary of the Interior or the Secretary of Commerce to issue a permit for incidental taking. To obtain an incidental taking permit, an applicant must submit a "conservation plan" which must set forth, among other things, the specific steps that the applicant will follow to minimize the impact of taking on the protected species under consideration.

In the petroleum industry's experience, the conservation plan exceeds the protection required to minimize the effects of incidental taking under the "reasonable and prudent measures" standard established under Section 7 of the ESA. In essence, the conservation plan must provide for the long-term habitat needs of not only listed species, but proposed and candidate species as well. Moreover, in areas where Federal parcels are interspersed with state and private lands, the existence of these two standards creates confusion for project planners and compliance coordinators.

We believe that the problems associated with excessive conservation plans stem from the precedent established by the San Bruno Mountain (SBM) conservation plan in Northern California. According to the 1982 amendment's legislative history, the SBM plan was the model for the incidental taking provision in Section 10(a). Even though the SBM plan failed to specify the smallest geographical unit which must be addressed in a conservation plan, it was used as a prototype to resolve disputes among adversarial interests in an area where public and private lands are interspersed and governmental jurisdictions overlap. Similarly, regulations proposed under Section 10(a) follow the SBM conservation plan as a model, but they do not specify the smallest geographical unit.

In this regard, we believe that the 3,600 acres that were included in the original SBM conservation plan is not an appropriate nor a desirable number of acres for conservation plans in other areas. In addition, we see no evidence that the SBM conservation plan or proposed regulations take the duration of the project into account, nor do they address the actual magnitude of impacts from incidental taking.

The American Petroleum Institute believes that individual developers should be able to obtain site-specific incidental taking permits where the protection provided to the species is analogous to the protection provided to the species under the ESA's Section 7 "reasonable and prudent measures." To solve the problems with the ESA's Section 10(a) incidental taking permit, we recommend that the following steps be taken:

1. Resolve the inconsistent standards required to mitigate incidental taking under Section 7 and 10 by specifying that the purpose of the Habitat Conservation Plan is analogous to those "reasonable and prudent measures" necessary or appropriate to minimize the impacts caused by incidental taking.

2. Reaffirm that the intent of the incidental taking provisions was to provide Secretarial discretionary authority to issue Section 10(a) permits that address whatever geographical units may be appropriated to the nature, size and duration of the project, and that they may be issued for projects conducted by individual landowners.

INCIDENTAL TAKING AND THE MARINE MAMMALS PROTECTION ACT

Another inconsistency related to incidental taking seriously affects offshore operations in the petroleum industry. The Marine Mammals Protection Act (MMPA) does not include incidental taking permits for activities other than those related to scientific research. Therefore, the 1982 ESA amendments on incidental taking do not currently apply to marine mammals.

The inability of offshore operators to obtain incidental taking permits under the Marine Mammal Protection Act places our members in an untenable position. Although members of the petroleum industry include prudent mitigation measures to insure that they will not jeopardize marine mammals, we are still exposed to liability and uncertainty.

The case of the gray whale illustrates this point. Industry continues to participate in an ongoing series of studies to monitor the effects of its activities on marine mammals. For example, research completed to date in the Beaufort Sea suggests that the population of endangered gray whales is increasing and that geophysical survey activities do not harass marine mammals. We find, however, that offshore operators can implement all of the mitigation measures the agencies require, yet still be exposed to liability under the Marine Mammal Protection Act.

In amending the Endangered Species Act to authorize the issuance of incidental taking permits, the Congress sought to eliminate this sort of uncertainty. We endorse the National Marine Fisheries Service suggestion for a technical amendment to conform the incidental taking permit process for marine mammals to that used for all endangered species. We propose amending Section 17 of the ESA as follows: "Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive provisions of the Marine Mammals Protection Act of 1972, *except with regard to taking authorized by Section 4(d), 7(b)(4), and 10(a)(1).*"¹

EXPERIMENTAL POPULATIONS

In 1982, Section 10 of the ESA was amended to authorize the Secretary of Commerce and Secretary of the Interior to utilize experimental populations as a management tool for promoting the survival and recovery of listed species. Section 10(j) was created to provide the Secretaries flexibility in exercising management options, and it specified procedures for establishing experimental populations.

Section 10(j), however, does not state expressly that the prescribed procedures are the only procedures which the Secretary of Commerce or the Secretary of the Interior can use to satisfy Section 10. We believe that the procedures established by Section 10(j) should be followed. Without clear direction on the Section 10(j) process, landowners face uncertainty that impedes their ability to make long-term commitments, if the option of experimental populations is exercised.

API encourages Congress to eliminate this problem by clearly specifying that whenever either Secretary wishes to establish an experimental population outside the current geographical range on the species, the specified procedures of Section 10(j) must be followed. Such modification would greatly reduce uncertainty for parties that will be affected by the establishment of experimental populations.

CONCLUSION

In conclusion, API strongly supports the goals of the Endangered Species Act. Clarification of Congress' intent on Section 10(a) incidental taking permits and Section 10(j) procedures on experimental populations will result in more efficient administration of the statute. Furthermore, a technical conforming amendment which makes the MMPA compatible with the ESA will resolve any inconsistency on incidental taking permits. We appreciate the opportunity to submit this statement.

PREPARED STATEMENT OF ROLAND C. FISHER, SECRETARY-ENGINEER, COLORADO RIVER WATER CONSERVATION DISTRICT

Mr. Chariman and members of the Subcommittee, my name is Roland C. Fisher. I am Secretary-Engineer of the Colorado River Water Conservation District (District or River District), Glenwood Springs, Colorado.

By way of identification, the River District is a public agency created in 1937 under the laws of the State of Colorado (Colo. Rev. Stat. § 37-46-101) to conserve and develop the waters of the Colorado River and its tributaries within Colorado and to protect for Colorado the waters of the Colorado River System to which the State is entitled under the Colorado River Compact. Our jurisdiction covers all of twelve and parts of three other counties within the State on the western slope of the Continental Divide. The District is the major water policy agency of the State with respect to the principal headwaters of the Colorado River. I have attached a map showing the extensive area within the jurisdiction of the District. We also hold numerous decrees for the use of water for irrigation, domestic, municipal, industrial and hydroelectric purposes. The River District is currently a license applicant before FERC for a major multipurpose water conservation and hydroelectric project on the Yampa River in northwestern Colorado known as the Juniper-Cross Mountain

¹ Underlining denotes new language.

Project. A sub-district of the River District has developed another multipurpose water storage project on the White River near Rangely, Colorado, known as the Taylor Draw Reservoir.

The River District offers its comments today as an entity that has been closely involved with provisions of the Endangered Species Act several times over the past decade. For example, in connection with our application for a section 404 permit from the Corps of Engineers for Taylor Draw Reservoir, consultation under section 7(a) of the ESA was required. That reservoir was very recently completed but construction could not commence until we acceded to certain river flows below the dam desired by FWS, coupled with a flat payment by the District toward FWS research needs. We view this arrangement as somewhat one-sided in favor of FWS's position as holder of the "jeopardy" hammer under section 7 of the Act.

The consultation process has also been involved in connection with our application to the Federal Energy Regulatory Commission for a license for the Juniper-Cross Mountain Project. That consultation began in 1981 and has contributed to substantial delay, expense and frustration to the District. While current activity on the project has been delayed by other causes, the District is keenly aware that FWS views with respect to the Colorado River squawfish and humpback chub, as well as with other species alleged to be endangered and suspected to be in the project area, can provide real difficulties unless constructive solutions and recovery plans are encouraged and developed so as to permit water conservation by storage as well as species conservation sought by the ESA.

In addition, the River District is interested in the ongoing ESA consultation between the Bureau of Reclamation and FWS in connection with the Bureau's Ruedi Reservoir in northwest Colorado. We expect to act as the Bureau's water marketing agency for water for domestic, municipal, agricultural, and industrial purposes. In short, the River District, by virtue of its jurisdiction and responsibilities in a water short region that is home for a number of species listed as endangered is particularly affected by the strictures of the Act.

While we, of course, recognize that rivers contain only so much water and thus can support only a limited number of constructed projects, it is our view that the States' water appropriation systems must be allowed to allocate the scarce resource. The FWS approach of requiring a water and revenue "toll" in exchange for no-jeopardy is no more sound than a flat prohibition on development of water dependent projects: neither benefits the species and neither recognizes the States' water allocation systems.

The District has worked closely over the past fifteen months with the Colorado Water Congress Special Project, and other western water entities, in an effort to find some concord between the goals of the Endangered Species Act and the Western States' system of water law. As you may know, Colorado is the only state in the contiguous 48 into which no major streams flow. Hawaii is the only other state in which all the precipitation that falls over the state eventually flows out or is captured beneath the surface. Given that circumstance, and the fact of Colorado's prior appropriation system of water rights, projects designed to conserve and hold Colorado's water for beneficial public uses are absolutely essential. The District agrees with the CWC Special Project that judicious administration under the Act, in tandem with innovative recovery plans, can protect these water rights and needs as well as the needs of endangered aquatic species.

Our efforts with CWC have focused on the need for flexibility in the Act as implemented, and our preliminary studies and analysis tell us that the Act now contains the seeds for resolution of the apparent conflict between species protection and water rights. CWC has studied and developed creative alternatives to what heretofore has been a somewhat mechanical approach by FWS of looking at what we think are inflated flow requirements without looking at alternative means of recovery. The Act as it now stands encourages use of those alternative—and the River District certainly endorses them thus far. It is the District's view that CWC's careful biological and hydrological studies and current efforts to formulate creative alternatives forms the basis for a positive approach to avoiding water problems under the Endangered Species Act. The mechanisms for implementing these alternatives exist in the Act, and we hope the Committee will urge FWS to utilize them.

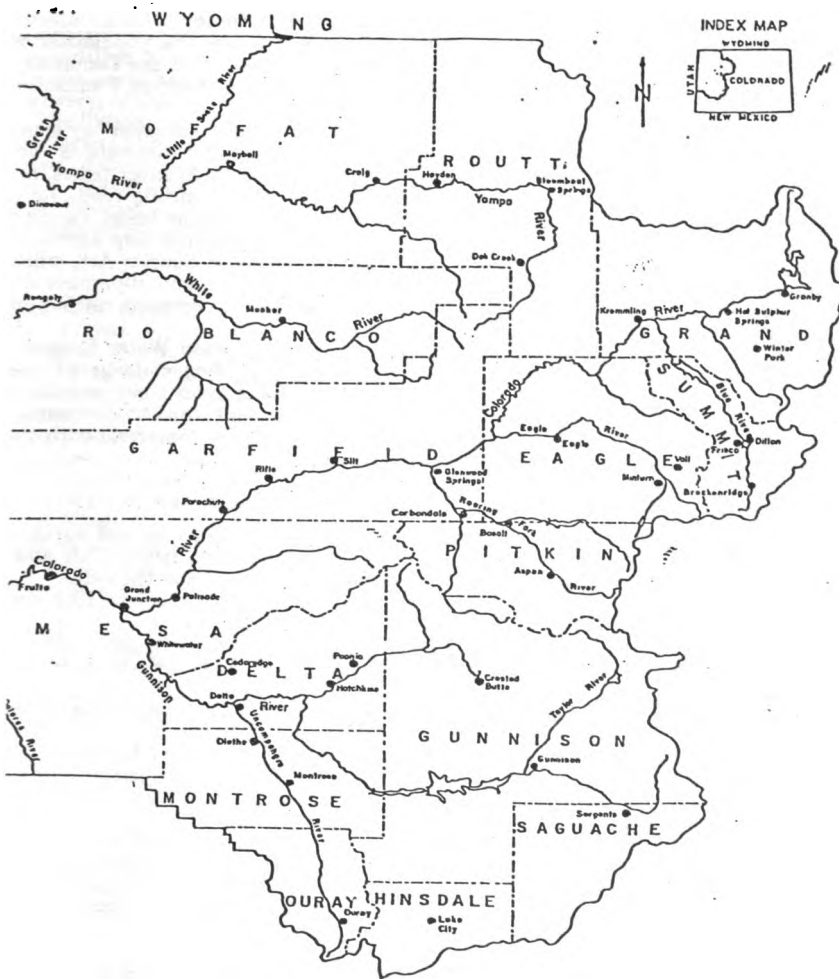
The Act also requires the Secretary of the Interior, through the Fish and Wildlife Service, to develop programs to aid recovery of endangered or threatened species. Indeed, one goal of the Act is to work toward delisting of species—to "halt and reverse" the trend toward extinction. CWC's work on species recovery programs, which the District fully supports, is hoped to assist in heading off endangered species/water use conflicts. Congress should therefore encourage Interior to carry out its responsibility for recovery and eventual delisting of endangered fish species.

Specific alternatives that will lead toward recovery of fish species in the Upper Basin of the Colorado River include construction of fish passages at new and existing dams, hatchery and stocking programs, research and monitoring, modification of operation in existing or proposed facilities, habitat improvement measures, and construction of afterbays for regulation of water temperature. The Act places no real limits on the Secretary's choice of methods to effect species recovery, and this mix of tactics is fully in line with many of the extraordinary efforts undertaken on behalf of other species. The River District believes that these alternatives, if seriously considered and implemented by FWS as the Act requires, will serve not only the Act's purpose of species preservation but also the essential development of water for human needs.

In that light, therefore, the District suggests that the Act be reauthorized in its present form for a period of one to two years, rather than for the three year reauthorization now contemplated in H.R. 1027. A shorter period is necessary, we believe, to allow the administrative approach we advocate a chance to show its efficacy. If all involved look seriously at creative alternatives, further reauthorization of the Act a year or two down the road may be a simple matter. On the other hand, if the approach we suggest proves unworkable for whatever reason, that will be apparent within the shorter time frame.

Moreover, FWS has been slow to issue its regulations implementing the 1982 amendments. In fact, its final regulations governing the new exemption procedure issued only a few weeks ago on February 28. To date, no final regulations under section 7's consultation provision have been promulgated. Clearly we should allow some experience under these regulations, but not such a long time that change is not possible should Congress see that its will is not being implemented.

The Colorado River Water Conservation District believes that the cooperative recovery approach described above is consistent with the Congressional intent of the Act. We thank the Chairman, Honorable John Breaux, and the Subcommittee Members for this opportunity to make a statement for the record on this very important subject.



COLORADO RIVER WATER CONSERVATION DISTRICT

SUPPLEMENTAL STATEMENT OF COLORADO WATER CONGRESS

At the Subcommittee's hearing on March 14, 1985 certain conservation groups, in our opinion, seriously misrepresented the factors which affect the population of native fishes in the Colorado River Basin. These groups also asked the Committee and the Congress to disapprove the "Windy Gap" approach to Section 7 consultations under the Endangered Species Act.

The "Windy Gap" approach, though it has been criticized as "extortion" by some water interests and not protective enough by some environmental interests, is contributing directly to the conservation and recovery of the Colorado River fishes, because it identifies conservation and recovery measures and scientific field work, which project sponsors help to fund as water use goes forward in the basin. Pending the development of recovery plans, which is underway, the Windy Gap approach was fashioned to meet the goals and terms of the Endangered Species Act, while avoiding conflicts with state water allocation systems, equitable apportionment decrees of the United States Supreme Court, and interstate water compacts ratified by the United States Congress.

In light of testimony at the March 14th hearing, the Colorado Water Congress submits further facts and discussion to the Committee regarding endangered species/water use conflicts and their resolution. The Water Congress is composed of approximately 1200 municipalities, conservancy districts, agricultural water organizations, businesses and other groups in Colorado which are vitally concerned with the protection and development of Colorado's water resources.

FACTORS AFFECTING THE NATIVE COLORADO RIVER FISHES

The testimony of the conservative groups singled out flow reduction and dams as the sole or primary cause of decline of the native Colorado River fishes. This testimony omitted the following factors which affect the current status of the fishes:

1. Colorado River squawfish were commercially harvested in the late 19th and early 20th centuries.
2. Historic and ongoing stocking of game fish—by the Federal and State governments, particularly bass, pike, and catfish—has introduced predators which feed on the young native fishes.
3. Game fish have introduced parasites and diseases which have infected the native fish.
4. Federal and State governments attempted to eradicate the native fishes, by poisoning reservoirs and more than 50 miles of major rivers in the Upper Colorado River Basin alone, to remove what were then called "trash" or "rough" fish and to create habitat for game fish.

We emphasize that there has been no showing that depletion of water from streams in the Upper Colorado River Basin, under the applicable interstate compacts and the laws of the States, is the cause of endangerment to the native fishes. See August 19, 1983, letter of Upper Colorado River Commission to Galen Buterbaugh, copy attached.

HYDROLOGY OF THE COLORADO RIVER BASIN AND THE LAW OF THE RIVER

The 1922 Colorado River Compact was adopted by the States of Wyoming, Utah, Colorado, New Mexico (the "Upper Basin") and Arizona, Nevada, and Wyoming (the "Lower Basin") and was ratified by Congress, 42 Stat. 171. This Compact guarantees an average delivery of seven and one half million (7,500,000) acre feet of water annually from the Upper Basin to the Lower Basin on a 10-year running average. A copy of the Compact, as codified in Colorado law, is attached. Thus, the Upper Basin States cannot "dry up" the Colorado River. This vast quantity of water will continue to flow through the habitat of the endangered species, making flows available for the native fishes and other wildlife as an inevitable by-product of the "Law of the River."

In our opinion, the conservation groups have misled this Committee by suggesting that "80-95 percent of the water available" in the Colorado river system "has been stored, diverted, or consumed." The facts are that 50% of the supply of the Colorado river system cannot be consumed by the Upper Basin. The Upper Basin's share is allocated under the 1948 Upper Colorado River Compact, which was ratified by Congress, 63 Stat. 31.

It would be the height of folly, a breach of historic legal agreements, and unnecessary to deprive States of the exercise of rights to water allocations which they have under interstate compacts and equitable apportionment decrees.

Section 7 of the Endangered Species Act requires the Fish and Wildlife Service to pursue "reasonable and prudent alternatives." It is not a reasonable and prudent alternative to prevent or restrict depletions which the States and their water users are entitled to make. On a scientific basis, use of water in the Upper Basin under the compacts has not been and cannot be correlated to the decline, or prevention of recovery, of the native fishes.

The "Windy Gap" approach is a reasonable and prudent alternative to what otherwise would be irreconcilable conflict between the Endangered Species Act and the "Law of the River." The use of this approach by the Fish and Wildlife Service has led to the affected States and their citizens working towards conservation of endangered species, rather than opposing the Act and asking for restrictive amendments or exemptions from the Act's coverage.

THE WINDY GAP APPROACH

In 1981 the Fish and Wildlife Service issued a biological opinion for the Windy Gap Project, a water diversion project located near the junction of the Fraser and Colorado Rivers, high up in the Colorado River Basin watershed. A copy of this opinion is attached. The project sponsor demonstrated that flow reduction downstream in the habitat of the native fishes, as a result of Windy Gap depletion high on the headwaters of the Colorado River, was so minute, under the worst possible case, that it could not be measured or predicted to make any difference at the point of impact on the native fishes. The Fish and Wildlife Service opinion concluded that: "In short, it is reasonably expected that the impacts of the project on the likelihood of survival of the fish are extremely small. Therefore, a decision was reached that 'the Windy Gap Project is not reasonably expected to appreciably reduce the likelihood of survival of the endangered fishes of concern.'" See Windy Gap Opinion, p. 6. To resolve any remaining concern about the project's effect on recovery of the species, the project sponsor (the Municipal Subdistrict, Northern Colorado Water Conservancy District) agreed to help fund work related to the fishes. The project sponsor agreed to pay, and has paid, over half a million dollars (\$550,000.00) for conservation and recovery measures. See Windy Gap Opinion, p. 8.

The funds derived from the project sponsor were designated for:

1. Establishment of backwater habitat areas along the mainstream of the Colorado River between DeBeque Canyon in Colorado to the confluence of the Colorado and Green Rivers in Utah;

2. Support of a field research team of 3 to 4 persons, over a 3 year period, to evaluate habitat improvement techniques for the endangered fish species, and to continue collection of physical data need to assess the impacts of water depletion, sedimentation, and water quality changes on the life cycles of the native fishes.

In other words, under the Windy Gap approach, which has been used with regard to other water projects since 1981, private and local government water users have funded conservation and recovery measures designed to accommodate exercise of water rights in concert with the goals and terms of the Endangered Species Act.

It is extremely unfair and counter-productive to accuse water interests and the Fish and Wildlife Service of ignoring the Endangered Species Act. To the contrary, during a time when federal funding for water projects has been almost non-existent in the Upper Colorado Basin, and when federal funding for endangered species conservation is said by conservation groups to be inadequate to meet demands nationwide, financing has been forthcoming in the Colorado River Basin from water project sponsors to pursue very practical, needed work regarding the native fishes. The assessment of costs for such measures under the Windy Gap approach has been controversial among water users, who believe that the endangered species program should be funded entirely by Congress, since the Act sets forth a national goal. But the Windy Gap approach has attained acceptance, for the most part, while further conservation and recovery measures and funding alternatives are being examined by the Colorado River working group.

Information gathered in the past few years has been very useful in defining recovery measures. For example, habitat work and field work, using Windy Gap Project funds, has shown that game fish are a significant contributing factor to loss of young-of-the-year squawfish. A 1985 report of the Fish and Wildlife Service, submitted herewith, summarized a field project regarding bass predation. Very young squawfish were stocked in ponds containing bass. Right after introduction of the squawfish, "diets of the bass switched almost entirely to squawfish." Between "21 and 79 percent of the squawfish stocked were eaten the first night." The report concluded that "bass predation is obviously a very potent mortality factor." Predation resulted in "almost complete annihilation within two months." ("Annual Report,

Survival of Stocked Colorado Squawfish with Reference to Largemouth Bass Predation, January 15, 1985." pp. 8, 18.) Utilizing hatchery rearing techniques recognized by the Fish and Wildlife Service, Squawfish can be grown in large quantity to a size where they are not subject to predation.

It is unrealistic, and it would be a violation of the Law of the River, to shut down or remove dams and diversions in favor of returning to a completely natural Colorado River basin. Reasonable and prudent administration of the Endangered Species Act should recognize the continued development of water under the interstate compacts, equitable apportionment decrees, and water laws of the states.

Under the "Windy Gap approach" a number of projects have contributed funds to conservation measures. A Colorado River working group, which includes representatives of the Fish and Wildlife Service, the Bureau of Reclamation, and the States of Utah, Wyoming, and Colorado-assisted by water user and conservation groups—is formulating further conservation and recovery measures for the native fishes. Their work is expected to result in a report toward the end of 1985 or early 1986.

Contrary to the testimony delivered at the March 14 hearing by certain environmental groups, this working group process and the Windy Gap approach are working in a way which is consistent with the Endangered Species Act. The funds derived from the Windy Gap approach are being used for the development and implementation of sound conservation measures and refinement of scientific information regarding the fishes. Section 2(c)(2) of the Endangered Species Act states that the "federal agencies shall cooperate with state and local agencies to resolve water resources issues in concert with the conservation of endangered species." This is precisely what the Colorado River working group and the Windy Gap approach accomplishes.

We strongly oppose any suggestion that the Fish and Wildlife Service or the Congress should establish a moratorium on water development. We encourage Congress to endorse the working groups and other efforts of the Fish and Wildlife Service to administer the Endangered Species Act in concert with laws governing the allocation and use of water.

In the Platte River Basin it appears that the whooping crane habitat in Nebraska can be maintained through mechanical means to clear out roosting sites for the crane. Previously, it was claimed that large water flows were needed for this purpose. Water development activities and return flows from irrigation projects provide year round flows in the Platte River, a river which, historically, was frequently bone dry during the summer and fall months.

Again, as in the Colorado River Basin, interstate water allocation compacts and decrees guarantee that water will be available downstream. These include the 1924 South Platte River Compact, 44 Stat. 195, and the equitable apportionment decrees of the *United States Supreme Court in Wyoming v. Colorado*, 259 U.S. 419 (1922) and *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Wildlife management methods can be utilized to alleviate potential conflicts between state water allocation systems and the Endangered Species Act.

The testimony of certain environmental groups before this committee has raised the spectre of a halt to, or curtailment of, needed water development. This would destroy efforts to carry out the goals and objectives of the Act while upholding other important national and state goals and objectives. The Congress should encourage, not discourage, efforts of the Fish and Wildlife Service in this regard.

Upon reflection, after hearing the testimony at the March 14 hearing, the Colorado Water Congress endorses a two year reauthorization. This would allow the Colorado River and Platte River working groups to further refine measures and funding for the conservation and recovery of the native Colorado River fishes and maintenance of the whooping crane habitat. We anticipate that the working groups will present the Congress, the States, project sponsors, and environmental groups with measures and funding mechanisms which will involve ongoing efforts to recover the species while fully respecting state water management and allocation systems. We presently believe that the Secretary of the Interior has the authority under the Endangered Species Act program to implement such plans and programs.

With the results of the working group efforts in hand, Congress can then determine what further authority, if any, is needed to avoid and resolve potential endangered species/water use conflicts in river basins. Given the large geographic scope of the Platte and Colorado River basins, the working group product is expected to be a model for application elsewhere as similar problems arise. A longer reauthorization period leaves little alternative but to seek substantive amendments to ensure that state and interstate water allocation systems will not be displaced by implementation of the Endangered Species Act.

NOTE.—Submitted by: Gregory J. Hobbs, Jr., Attorney at Law, Davis, Graham & Stubbs, Denver, CO; William Thomas Pitts, P.E., Loveland, CO. Colorado Water Congress, Denver, CO.

NOTE.—Attachments to this statement are retained in Subcommittee files.

PREPARED STATEMENT OF THE COLORADO WATER CONSERVATION BOARD

INTRODUCTION

This statement is submitted by the Colorado Water Conservation Board, which is the state agency charged with the protection, conservation, and development of the water resources of the State of Colorado.

SUMMARY

Joint federal-state-private efforts are underway to solve problems which have arisen from the application of the Endangered Species Act to water resources development in the State of Colorado and other western states. The problems which have been encountered are substantial ones which have the potential to adversely impact: (1) the development of the waters to which the states are entitled pursuant to interstate compacts and decrees, and (2) the exercise of vested property rights under state water law. We believe that the efforts to resolve these problems merit the oversight of Congress, with directions to the Department of the Interior to report on their outcome in the context of a review and reauthorization of the Act in 1987. Thus, it is urged that the Endangered Species Act be reauthorized for only two years.

The Water Conservation Board is concerned about several aspects of the administration of the Endangered Species Act. In the event that the current efforts to find administrative solutions to conflicts between the Act's administration and water resources development are unsuccessful or require legislative confirmation, then Congress should deal with the necessary amendments to the Act two years from now.

STATEMENT

Water project development in Colorado inevitably entails federal agency action of some sorts. Even when projects are privately financed, the large amount of federal land ownership in Colorado (about one-third of the state's land area) or the requirement for section 404 permits under the Clean Water Act bring the federal government into the project development process.

Consequently, the consultation procedure called for in section 7(a) (2) and (b) of the Act is triggered for every water development project proposed in the Colorado River and Platte River Basins within Colorado. The involved federal agency must insure that its actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species. If jeopardy or adverse modification is found, reasonable and prudent alternatives must be implemented.

Because of section 404 of the Clean Water Act, the application of the Endangered Species Act to water development projects is not limited to isolated circumstances in Colorado or the other western states. The Act applies with equal force to water project development throughout the country. Furthermore, listed endangered fish species, and listed plants and birds which utilize riverine habitats, are found in at least 10 states outside the west. In short, the problems created by the Act for water development will be nationwide in scope, although problems in the western states seem to be receiving the most attention at this time.

Over the past four or five years, in both the Colorado River and the Platte River Basins, the U.S. Fish and Wildlife Service (Service) has consistently taken the position when issuing biological opinions pursuant to section 7(b) that nearly any additional depletion of water, no matter how small and even though within the entitlement of a state pursuant to interstate compact, would necessarily jeopardize the continued existence of three endangered Colorado River fishes or of the whooping crane, or adversely affect the critical habitat for the same. The scientific bases for these judgments have been, at best, uncertain due to a lack of information about habitat requirements, life stages, etc.

Nonetheless, the Service has taken the position that the entire burden of such uncertainty about the condition or requirements of a species falls on a project proponent when the Service renders a biological opinion. It is not clear that this is either appropriate or authorized by the Act.

In certain instances, the Service has suggested in its biological opinions that the only reasonable and prudent alternative available to a project is to provide specified instream flows. Such an alternative raises several problems: (1) there is often not a sound scientific basis for the suggested flows due to a lack of data; (2) in some instances the suggested flows would have been so large as to make a proposed project infeasible; (3) releases of water from a project from instream flows are not reasonably calculated to protect an endangered species if there is no legal mechanism by which such flows can be protected from subsequent diversion, especially when "deliveries" would be made across state lines and over very long distances; and (4) it fails to recognize the interstate compact entitlements of the states and vested property rights under state water laws.

Another major problem which has arisen is the apparent failure of the Service to recognize the distinctions between the requirements of section 4(f), which applies to recovery plans, and the requirements of section 7(a)(2). Pursuant to section 4(f), the Secretary of the Interior is to develop and implement recovery plans, the purpose of which is to identify and guide the implementation of the measures necessary to "conserve" an endangered or threatened species (i.e., bring a species back to the point of not requiring the protection afforded by the Act). In the jargon of the Service, the objective is to "recover" a species to the point that it can be "de-listed" (i.e., to provide for the "conservation" of a species so that it is no longer "endangered" or "threatened" within the statutory definition of those three terms).

Section 4(f) of the Act places the affirmative responsibility for the conservation of a species only upon the Secretary. Nowhere in the Act is it stated that the implementation of recovery plans, and the measures included therein, are the obligations of anyone other than the Secretary. As a corollary, the cost of implementing the measures in a recovery plan is the responsibility of the federal government.

In contrast, section 7 of the Act deals only with those situations in which federal agency actions, and in turn the actions of a water project's proponents, are likely to jeopardize the continued existence of an endangered or threatened species, or adversely affect its critical habitat. This is a requirement only that the condition of an endangered or threatened species be made no worse by a developmental project than is already the case (i.e., that a project not increase the danger of extinction of a species). This standard requires considerably less of a project proponent than the affirmative obligation placed on the Secretary for recovery plans, which obligation requires the Secretary to make a species "better off."

Despite this clear statutory distinction, there has been a tendency in the service to treat reasonable and prudent alternatives under section 7 as if they are the means by which a recovery plan is implemented. This is not a burden which the Act imposes on a project proponent.

Matters came to a head in 1983 as a result of two actions by the Service. The first was a formal biological opinion for the federal authorized Narrows project in north-eastern Colorado. In that biological opinion, the Service concluded that the project would jeopardize the continued existence of the whooping crane, the critical habitat for which is located some 265 miles downstream in Nebraska. The "reasonable and prudent alternative" which the Service suggested was to forego about one-third of the yield of the project for releases to instream flows which allegedly would arrive 265 miles downstream after crossing a stateline (the flows at which are subject to an interstate compact) and after passing untold number of headgates which could not be prevented from diverting the waters so released. Furthermore, there was little, if any, evidence demonstrating that such releases would accomplish the channel scouring which was sought. In short, the proposed alternative was not reasonably calculated to actually minimize any adverse effects on the whooping crane.

The other action was the release of a document styled a draft "conservation plan" for the three endangered fish species in the Upper Colorado River Basin. This document, as had earlier biological opinions, proceeded on the assumption that there could be no further depletions whatsoever to the Upper Colorado River system without jeopardizing the continued existence of these fish species. It suggested that pre-1960 minimum flows be maintained, including very large flushing flows which could have effectively prevented the State of Colorado from achieving any further water project development even though it is entitled to about 1 million acre-feet of additional annual depletions under the relevant interstate compacts.

In light of the problems being encountered, the Colorado Department of Natural Resources, the Colorado Water Conservation Board, and Colorado water users suggested that there be joint efforts in both the Upper Colorado and Platte River basins to seek solutions satisfactory to all concerned. The result has been the execution of a memorandum of understanding between the Service, the Bureau of Reclamation, and the states of Colorado, Wyoming, and Utah in the case of the three endangered

Colorado River fishes, and the implementation of a joint effort by the Service, the Bureau, and the states of Colorado, Nebraska, and Wyoming to deal with the whooping crane issues in the Platte River basin.

The objective of both efforts is to seek ways which will meet the requirements of the Act without conflicting with state water rights systems and the use of water apportioned to a state pursuant to interstate compacts and decrees of the U.S. Supreme Court. It is also intended that reasonable and prudent alternatives be identified which will minimize the use of water. Such measures may include habitat acquisition, management, and maintenance, artificial propagation (e.g., through hatcheries), legally appropriate uses of federal reservoirs, reduced planting of competing exotic sport fishes, and others which can be effected to the benefit of the species without impairing beneficial uses of water under state law.

Both efforts are premised upon a willingness to try to avoid conflicts between the Endangered Species Act and the exercise of vested state water rights. We support these efforts because we do not believe that protracted litigation in an adversarial climate would be to anyone's benefit and because we are sincerely hopeful that the ongoing administrative efforts will indeed prove to be fruitful. If the involved parties will start from the premise that both the requirements of the Endangered Species Act and state water laws and compact entitlements can each be fully protected, we believe that the problems of the past several years can be resolved.

We regard these efforts as well within the scope of the Act and the discretion which it provides to the Secretary of the Interior, particularly in light of the directive of section 2(c)(2). This section states that it is the "policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."

We respectfully request that Congress give recognition to the on-going administrative efforts described above and direct the Secretary of the Interior to report back to it in the context of a review and reauthorization of the Act two years from now in order to insure that every reasonable effort has been made to administer the Act in a manner which resolves the problems which have been encountered. In the event that the current efforts are unsuccessful, then Congress should deal with necessary amendments. It may also be that the solution to which the involved parties will hopefully come over the course of the next two years will require a legislative confirmation in order to be properly implemented. For these reasons, reauthorization of the Act at this time should be for only two years.

We believe that the efforts to find administrative solutions are reasonable and responsible ones which bear the support of this committee. We ask that you express that support by reviewing the Act's administration at the end of a two-year reauthorization period.

PREPARED STATEMENT OF COMMITTEE FOR HUMANE LEGISLATION, FRIENDS OF ANIMALS, INC.

As is well known, since enactment of the Endangered Species Act, the number of endangered and threatened species has risen by several hundred. We must now look to solutions beyond the Act if this number is to decline. The cause of the increase is due to deficiencies in the Act in addition to too few dollars.

The Committee for Humane Legislation proposes that as the Act is reviewed consideration be given to placing a prohibition on all habitat manipulation on federal lands inhabited by endangered or threatened species, whether such species are on endangered or threatened species lists of the federal or state government, and such habitat manipulation to include but not be limited to burning, tree cutting, flooding, planting, roadbuilding or defoliation.

It is clear that money alone directed as it has been in the past is not the answer. We would caution also that a proposal currently being put forth—the setting up of a fund such as Pittman-Robertson to provide the money for the Act—is also not the answer.

Our study of decentralized Pittman-Robertson records indicates that vast sums of Pittman-Robertson monies have been expended in an enormous "management" boondoggle. Pittman-Robertson supplies funds for hundreds (if not thousands) of "managers" to "study" wildlife as though it were something new in nature. In our view, we should take man out of management, and let nature manager wildlife. We should end the endless "habitat manipulation programs" which have been implemented to enhance populations of "game" animals.

Let us be realistic. When legislation was passed in 1980 to provide protection for non-game species (90% of vertebrates are considered non-game), the proposal was

made that an excise tax be placed on bird seed and bird houses to fund the program. Pittman-Robertson is an excise tax on guns, ammunition and sports hunting equipment which funds "game" animal programs. You can judge for yourself how equitable it is to give gun, ammunition and sport hunting equipment excise tax to 10% of the animal population and bird seed and bird house excise tax to 90% of the animal population. Since it was stated that much of the bird seed and many of the bird houses were purchased by people on fixed incomes this was not considered the solution for funding. The decision was made to fund out of the general treasury until the results of a U.S. Fish and Wildlife study on the funding issue had been received by the Congress. In our view, the need for the non-game bill would not have been nearly so critical if Pittman-Robertson funds had not gone to habitat manipulation for over 40 years to build "game" populations to the detriment of every other animal and plant. Likewise, the list of endangered and threatened species would not be mounting if we ended federally funded burning, tree cutting, flooding, planting and defoliation which is the cause of extensive loss of animal and plant life.

We would further propose that no land acquired for conserving listed species under the Land and Water Conservation Fund may be used for hunting and trapping.

PREPARED STATEMENT OF JOHN M. FITZGERALD, WASHINGTON REPRESENTATIVE,
ENDANGERED WILDLIFE PROGRAM, DEFENDERS OF WILDLIFE

MR. CHAIRMAN, ON BEHALF OF DEFENDERS OF WILDLIFE AND ITS 65,000 MEMBERS, I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO PRESENT TESTIMONY ON H.R. 1027, A BILL TO REAUTHORIZE THE ENDANGERED SPECIES ACT.

This statement is intended to assist you in upholding the promise made in 1973 that Federal law would protect endangered species and enhancing the Act so that we can say in good faith to the people of every state and to the world community that we have not chosen extinction by neglect, that we will perform on our promise, and that it is not too late for much of the world to preserve the wildlife on which we truly depend.

I will first address the authorizations required to carry out the requirements of the Act based on current program requirements alone and not on what could be done in the best of all worlds. I will then discuss issues of law and policy now affecting the success of the Act. Finally Defenders provides additional detail in supporting documents incorporated as the remaining parts of this testimony.

A. AUTHORIZATIONS AND RESOURCES REQUIRED

In order to make the Act work as intended, it is quite clear that more resources are required. We will first provide a summary of the funding levels required and then an explanation.

Before reviewing the programs' actual requirements, it is worth noting that for the authorization levels to simply keep up with the inflation that we have experienced and that is projected (using the Congressional Budget Office's Gross National Product Deflator through FY 1988) the following authorization levels would be required.

As we begin to consider the level of resources necessary for the proper administration of the Act for the near future we should note the figures necessary to maintain the current authorization in real dollars through fiscal year 1988. For this purpose we have used the inflation indicator recommended by the Congressional Budget Office, which is the Gross National Product Deflator (GNPD). The factors provided by the CBO were actual figures for Fiscal Years 1983 and FY84 (3.9 % and 3.8%) and projected figures from FY 85 through FY88 (3.4, 4.5, 4.5, and 4.2%). The existing authorization levels were multiplied by the GNPDs for FY83 through FY88 to arrive at a figure that would reflect a constant dollar authorization through FY88.

(In millions of dollars)

Current Level (Set in 1982)		1988 Maintenance Level
ESA Section 15		Authorization Levels
(a) (1) Interior	27.	34.26
(2) Commerce	3.5	4.44
(3) Agriculture	1.85	2.35
(b) State Cooperation	6.	7.61
(c) Exemptions	.6	.76
(d) International	.3	.35
Total	<u>39.25</u>	<u>49.77</u>

Summary Of Resources Required

In testimony before the House Appropriations Subcommittee on Interior, Defenders recommended the following appropriations based on a careful analysis of actual expenditures per species in listing and recovery and other documented needs of the program. A number of other major organizations recommended similar levels of appropriations in their testimony and over twenty organizations across the country have endorsed funding levels of this magnitude. We urge this subcommittee and the Congress as a whole to authorize appropriations for the agencies for FY86 through FY88 or beyond of approximately twice the level approved in 1982 in order to accommodate the recommended spending level and some growth in the "out years" and approximately four times the 1982 level for State Cooperative programs.

	Defenders Recom.	FY1986 Admin. Budget Est.
Listing	10,750,000	2,924,000
Law Enforcement	8,363,000	7,341,000
Consultation	3,900,000	2,552,000
Recovery	15,500,000	5,869,000
Research	5,200,000	4,252,000
(\$27 Mill. Authorized)	<u>43,713,000</u>	<u>22,938,000</u>
Cooperation with States (\$6 Million Authorized)	25,700,000	3,920,000
 Total FWS End. Species: (\$33 Million Authorized)	 69,413,000	 26,858,000

The Merchant Marine Committee should also make it clear in its Committee Report that substantial endangered species programs should be a permanent part of the Bureau of Land Management and the Forest Service where good but small programs are now threatened with severe cuts. We have recommended to the Interior Appropriations Subcommittee that their funds be increased beyond the level experienced last year as follows:

Forest Service	+ 2,000,000	(not segregated)
Bureau of Land Mgt.	+ 1,050,000	"

Furthermore, the National Marine Fisheries Service will not be able to carry out its large mandate on endangered species without growing to the seven million dollar program level in the next few years, as part of the larger protected species program. We recommend for FY1986 a portion of that increase:

National Marine Fisheries Service	+ 2,590,000	(not segregated)
--------------------------------------	-------------	------------------

Therefore, we recommend authorizations for the next three to five years as follows:

Section 15 (a) (1)	(Interior)	\$ 50,000,000
(2)	(Commerce)	7,000,000
(3)	(Agriculture)	3,000,000
(b)	(Cooperation	
	with States)	26,000,000
(c)	(Exemptions)	800,000
(d)	(Convention	
	Implementation)	400,000

Analysis of Resources Required

-Listing-

There are nearly four thousand species of plants and animals that are candidates for listing. Until they are reviewed and listed, they are unprotected by the act. The terms of the act envision that given the data required, qualified candidates be listed generally in about two years. The congress has wisely provided this general timetable because we have seen over and over again wildlife species decline rapidly to either extinction or a point where recovery is extremely expensive and does not allow for any substantial conflict with humans. To allow that to happen does not make economic, biological, or political sense.

To prevent that, we must provide the resources to survey the status of the candidates and list those that are endangered. In 1984 the Service already had information sufficient to warrant the listing of 1819 candidates. To list those species in even ten years, it will cost approximately \$5.75 million a year at current rates. To do the status work and list even a portion of the remaining 2711 candidates, presuming only some are found to warrant protection, would cost about 5 million dollars per year. Thus we recommend a total of \$10.75 million for listing.

At whatever level is possible, an increased investment in listing is probably the most cost-effective investment increase since without any further spending, listing puts agencies and others on notice that the species is protected and it allows the secretary and in some case, private parties, to act to prevent the taking of the species.

The lynx, the desert tortoise, and the western yellow-billed cuckoo are examples of candidate species that the service should review soon in order to determine what sort of protection should be provided.

-Recovery-

Recovery is the next important step. In the past year, the endangered palos verdes blue butterfly of California was apparently eliminated. Without sufficient recovery resources, we will see more extinctions occur even while species are listed and under the full protection of the act. It also costs several thousand dollars per plan to prepare recovery plans and to review and revise them every five years as the act requires. Yet about 40% of listed U.S. Species are not yet covered by a recovery plan. Another \$6 million should be provided to implement existing and anticipated recovery plans in FY86 given projected program activities at basically current rates. That results in recovery costs of \$15.5 million. We are not asking that the Congress fund every recommendation of every recovery plan. (For comparison's sake, the FWS recovery plan for the grizzly alone recommends that over \$6 million to be spent in the few years of activities projected by the plan.)

Endangered species that deserve better recovery help than they have received include the red-cockaded woodpecker and the black-footed ferret, which is nature's own prairie-dog control agent. Of the additional funds we recommend for recovery, approximately \$350,000 should be devoted to work on the black-footed ferret, including both work in the field and a captive breeding program that could begin at the Service's Pautuxent, Maryland facility, or at Washington State University while field work proceeds in Wyoming.

If \$15.5 million for recovery sounds expensive, we should realize that the sooner we make an effort to recover these species and ensure their conservation, the less expensive and intrusive those efforts will be. This is not the time or place to go over the basic arguments for preventing extinctions, but even this act has a process for deciding when we must choose a possible extinction over a specific expense or action that would be required to avert it. What we must not do is to choose extinction by neglect.

Cooperative Agreements

The third major area of concern is cooperative agreements with the states and other jurisdictions. This area allows the vast pool of expert personnel in the state agencies to carry out local and regional projects to enhance the habitat and survival of endangered species. The cooperative program

matches three Federal dollars to each state dollar invested in a cooperative agreement. It is also a means of sharing personnel, a particularly key factor when personnel ceilings are low. In regard to personnel ceilings, the Subcommittee may want to waive certain personnel ceilings imposed on the FWS itself by administrators and allow the appropriations and authorizations levels to control the amount of work that is undertaken. The congress should demonstrate a firmer commitment to this very effective program to allow the states to do the same. In order to restore the program to the real levels of funding for each agreement provided in 1977, even without planning for new species or agreements, it will cost \$25.7 million per year.

Consultation

The costs of consulting with other agencies to prevent jeopardy to listed species will rise somewhat in response to an increase in listed species. Even if these species are not listed promptly, it has been shown to be good management practice to consult or confer over the potential effects of projects on candidates expected to be listed to avoid having to make sudden changes in agency plans in response to listing. Any effective monitoring system for candidate species should have its own internal udget of at least \$500,000. This could e divided between the Listing and Consultation line-item activities. The appropriation for consultation should in either case be \$3.9 million. (See attached comments on Consultation below in Section F.)

Law Enforcement

Law enforcement activities should be supplemented by establishing a forensic laboratory and related capabilities for the FWS. This would cost \$2.5 million in the first year and \$2 million per year after that, of that \$700,000 would be an amount proportionate to the endangered species work done in forensics now. Better information, intelligence, and technical assistance systems are needed for the enforcement of the convention on International Trade in endangered species. These systems and related work have been estimated to cost \$330,000.

Recent cases involving the endangered Florida Panther and other species have shown that greater funding should also be provided specifically for the private rewards authorized in the act because private rewards can lead to very substantial information that enforcement officers cannot otherwise get.

In all we recommend a total of \$8,363,000 for endangered species law enforcement for FY86.

Research And Development

In research and development at least four or five new species programs should be initiated, preferably ones with as much general applicability as possible. Black footed ferret work is a high priority for the Department if additional research funds were provided for example. At the current average, this would cost another million dollars.

BUREAU OF LAND MANAGEMENT

The Bureau Of Land Management has done some very good work recently. Largely in response to this subcommittee's direction last year to enhance recovery work. However, it lacks the resources, such as botanists, fishery and invertebrate biologists, to adequately carry out its endangered species conservation and recovery mission. We recommend an additional \$1,050,000 to implement recovery plans that have not yet been activated, to add needed staff, and to increased the farsighted work on candidate species already begun.

FOREST SERVICE

There are indications that the forest service is also adopting a more comprehensive view of its endangered, threatened, and sensitive species. However, there have also been horror stories. For example, there has been repeated but entirely avoidable destruction of red-cockaded woodpecker colonies both on and off forest service lands while the forest service itself holds most of the habitat that can be protected, and hence holds the fate of the bird in its hands. The woodpecker was one of 8 endangered species for which the USFS had active plans. There are 62 more that have received minimal attention. We therefore recommend that the current allocation be increased by \$2,000,000

ENDANGERED AND PROTECTED SPECIES OF MARINE LIFE

The National Marine Fisheries Service (NMFS) of the Department of Commerce is responsible for the identification and recovery of endangered and threatened marine species. Nineteen marine species have been listed under the ESA, including all seven species of sea turtles, the shortnose sturgeon, several species of pinnipeds, and most of the great whales. All species of marine mammals, including those listed under the ESA, are also protected by the Marine Mammal Protection Act (MMPA). NMFS has combined activities and budgets authorized by the ESA and MMPA into its "protected species" line items for research and management. Our comments here are directed at endangered species work; however, we support continuing work authorized under the Marine Mammal Protection Act at at least the current levels as well.

A reduction from \$11.251 million to \$6.976 million has been proposed for protected species research and management line items in the FY86 NMFS budget. Funds available for research would be cut by more than 50 percent, to \$2.675 million. Marine Mammal and endangered species research is to be cut by \$1,500,000 and redirected to the Fisheries - Oceanography Coordinated Research Program (FOCI). We oppose any shift in funds at the expense of endangered and threatened species, particularly in light of the apparently continuing decline of some listed species such as the Gulf of California Harbor Porpoise and continuing damage done by debris and gear entanglement to other species. The Administration proposes to cut \$1,000,000 from debris and gear entanglement work as well. Research cuts also include \$600,000 for research on the endangered bowhead whale, and \$175,000 for research on the endangered Hawaiian monk seal. Even if a certain phase of research has been completed in these areas, work can shift to more active protection and recovery based on that research, such as establishing a reasonable critical habitat boundary of 20 fathoms for the monk seal and working with the fishing industry to protect that habitat. We have recommended restoring funds for each of the above areas, and we recommend the authorization levels be increased for future years. There is more work to be done. For example:

We recommend that \$50,000 be provided to develop and begin implementing a recovery plan for the Gulf of California Harbor Porpoise. The recent listing of this small cetacean presents a unique opportunity for bilateral work with the Mexican Government and perhaps our last chance to save the smallest porpoises on earth from extinction.

We recommend that an additional \$1,240,000 be made available for research and recovery work on endangered and threatened Sea Turtles.

These projected Sea Turtle expenses include:

- \$120,000 for further testing of the Turtle Excluder Device (TED) and for promotion of its use in the U.S. shrimp industry. The device, which eliminates the incidental drowning of threatened and endangered species of sea turtles, must be promoted. Unless there is aggressive promotion of the device, the voluntary adoption program, supported by the industry, the government, and the conservation community, will fall apart. In that case, public pressure, including possible court action, could force the agency to require the use of the TED through regulation.
- \$500,000 is needed for surveys of sea turtle populations. In order to provide adequate information for the status review of listed sea turtle species as required under the ESA, NMFS must conduct a thorough survey of U.S. waters in

order to estimate population sizes and trends. This requires expensive aircraft and boat time.

- \$500,000 is needed to expand the NMFS headstarting of critically endangered Kemp's ridleys at the Galveston laboratory. Unless substantially more juvenile Kemp's ridleys are released, the prospects for recovery of the population will remain very dim.
- \$70,000 is required as a U.S. contribution to preparing and supporting research for the second session of the Western Atlantic Turtle Symposium (WATS). WATS is providing a means for regional cooperation in the recovery of threatened and endangered sea turtle populations.
- \$50,000 is required to provide research and other support for the development of a recovery plan for Pacific sea turtle populations. The development of this plan is long overdue, at a time when pressures upon resident populations are increasing.

Finally, to do its work under the Endangered Species Act, NMFS must develop a system for identifying and evaluating candidates for listing under the Act. NMFS should also develop and propose a list of endangered and threatened marine plants and animals. NMFS does not have the capacity to do so on any regular basis. The most effective way to accomplish this may be to provide the funds and direct NMFS to develop both the system and the list in conjunction with an Institution such as the National Science Foundation, the National Museum of Natural History, or the Woods Hole Oceanographic Institute. We estimate that \$300,000 would be required for developing an appropriate system and that another \$1,000,000 would be required for developing the initial list.

Given the very expensive nature of marine research, a full program of status surveys, listing, and recovery work for endangered and threatened marine species could require approximately seven million dollars a year, certainly by FY88.

(For further detail on budget requirements, see the letter from Defenders et al to Chairman Breaux of February 22, 1985 which is attached along with supporting documents to the testimony on H.R. 1027 of members of the ESA Reauthorization Coalition, which includes Defenders, presented by Michael Bean, Environmental Defense Fund.)

B. THE CASE AGAINST AMENDING THE ACT TO ENCOURAGE SPORT HUNTING OF THREATENED WOLVES AND GRIZZLY BEARS.

On February 19, 1985, the U.S. Court of Appeals for the Eighth Circuit ruled that the Secretary of the Interior may not authorize sport hunting or trapping of a species listed as "threatened" under the Endangered Species Act (ESA). The Court upheld the decision of Judge Miles Lord in favor of plaintiffs Sierra Club, Defenders of Wildlife, The Humane Society of the United States, the National Audubon Society, and eleven other conservation and wildlife organizations.

The lawsuit had challenged the "sport trapping" season planned for wolves by Minnesota (where there are approximately 1200 wolves) on the grounds that the Endangered Species Act forbids such a general "taking" of threatened species unless the Secretary finds that excess population pressures within a given ecosystem cannot otherwise be relieved and that the taking would help to conserve the species. It is generally expected that this decision could also "affect the ability of the state of Montana to carry out its planned sport season on grizzly bears. Like the Minnesota wolf, the grizzly is listed as threatened in the lower 48 states, but the status of the grizzly population is less certain, consisting of between 400 and 800 individuals.

On behalf of ten members of the ESA Reauthorization Coalition, Michael Bean of EDF and author of The Evolution of National Wildlife Law, has defended the decision in his testimony on H.R. 1027 and noted:

[I]t is important to examine the court's decision closely.

First, the court did not limit the Secretary's authority to take or authorize the take of predating or depredating animals in order to protect life or property. Indeed, the court left open two different means by which this can be accomplished: general regulations authorizing predator control activities and special permits under Section 10(a)(1)(A) of the Act. The latter authority is equally applicable to both threatened and endangered species. Thus, the often proffered argument, that effective control of endangered or threatened predators is necessary to sustain public support for their conservation and deter vigilantism, can be accommodated under the court's opinion.

Neither does the decision limit the Secretary's discretion with respect to species that are part of an "experimental population." Instead, the court very clearly refrains from reaching any conclusion on that issue. Thus, the very narrow decision of the Court is that the Secretary may not authorize

sport hunting of a non-experimental, threatened species unless, as the Act's definition of "conservation" specifies, extraordinary population pressures cannot otherwise be relieved. That narrow prohibition will have virtually no impact on sport hunting in the United States because most hunted species do not face the threat of extinction within the foreseeable future. For a species that does, however, and is thus listed as threatened, the original drafters of the Act properly concluded that sport hunting of it would not be an objective of its conservation, but rather a permissible means, in very limited circumstances, of securing its conservation. Absent any new and compelling basis to reconsider that judgment, the conclusion reached in 1973 should be continued.

However, representatives of the Montana and Wyoming of Fish and Wildlife Agencies have today requested the Subcommittee approve an amendment to overturn the decision. The Department of the Interior would appear statement to prefer an amendment to allow increased hunting of grizzly bears and wolves and other threatened species, without officially proposing language to amend the ESA. It is quite difficult to come up with any responsible and wolves and other threatened species, without officially language that would allow more general taking of threatened species than is allowed by the Act as it now stands, even if one were to decide that that was good policy.

In response to questions from Chairman Breaux about amending the Act to allow more hunting of threatened species, Dr. Robert Davison, a wildlife biologist of the National Wildlife Federation has responded that it is the Federation's position that the basic purpose of the Act was to first bring about recovery of threatened species so they can be delisted and then to consider hunting them. In fact, the Montana Wildlife Federation has voted not to support any amendment such as that sought by the Montana Department of Fish and Game.

Public Support for Wolf Conservation

In a related development, on March 7, 1985, Profeser Stephen Kellert of Yale University announced the results of a study on "The Public and the Timber Wolf" jointly sponsored by the U.S. Fish and Wildlife Service, the U.S. Foret Service, Defenders of Wildlife, and several independent foundations and donors. The study of attitudes of Minnesotans found that the strong majority of those both near and far from the wolves of northern Minnesota disapproved of sport seasons or other general reductions in wolf populations even where they are abundant. Although the vast majority support protecting wolves, they did agree with the humane taking of individual wolves that were guilty of killing livestock. In Minnesota and Montana the FWS removes predating animals, and Minnesota also compensates farmers for livestock losses due to wolf predation.

Support for the wolf is the general rule as the large majority of Minnesotans in every age, economic, and racial group feels that the wolf belongs in Minnesota and not just in places like Alaska.

Responses to Professor Kellert's survey indicate that significant levels of illegal wolf killing continue however. More than 40% of residents in northern counties and hunters from across the state reported knowing someone who had captured or killed a timber wolf, indicating that a high level of illegal take is still taking place. The USFWS estimates that from 200 to 250 wolves are illegally killed in Minnesota each year. To legalize further wolf kills when the population has not yet reached the recovered level, nor exceeded the ecosystem's carrying capacity would be most irresponsible.

In neighboring states, meanwhile, a modest recovery has begun as Wisconsin now has a resident pack of wolves, and Michigan has recently adopted the wolf as a symbol of its state wildlife programs.

Defenders' Position

The Act as it now stands requires that before any hunt or general taking of threatened species is permitted it must be shown that in a given ecosystem an excess population of the species exists that cannot be reduced without that hunt. Any proposed taking must also be shown to contribute to the conservation of the species. Neither the Montana Department of Fish and Game nor the Minnesota Department of Natural Resources has yet even attempted to meet these standards and it appears that Minnesota is not actively supporting any change in the Act.

The February 1985 Court of Appeals decision essentially upheld Congress's conclusion about taking of threatened species reached in 1973. That conclusion made good sense in 1973 and it makes good sense today, particularly when considered in light of the precarious nature of threatened species, the public support for such threatened species, including the wolf and grizzly bear, and the fact that this protective scheme has worked successfully for more than ten years.

Defenders has made it clear that it will judge every proposed hunt of threatened species on the merits of the data concerning each ecosystem as required by the Act. We are not opposed to every hunt of every animal in every ecosystem. We are

opposed to hunts of threatened animals when those hunts are not supported by good data and designed in accordance with that data.

We remain open to constructive discussions and cooperation to ensure the recovery of these animals in a responsible manner.

The Act requires that the Federal Government assist in the recovery of threatened species. Recovery of the existing populations of the Minnesota grey wolf and the Montana grizzly would not, according to available information, be aided by a hunt. The grey wolf population is at best holding its own against substantial illegal kills each year. The grizzly population is uncertain and may well be declining. In fact a task force of the Intergovernmental Grizzly bear committee concluded that available population data did not permit the task force to ever confirm population 1984 stability in the grizzly bear population of the Southern Continental Divide Ecosystem.

Proponents of the movement to weaken the ESA often argue that a sport season is necessary to successfully manage threatened species and to reduce public animosity toward such species. These arguments have no basis in fact. The ESA, as presently drafted, grants the Secretary of Interior a great deal of flexibility in the management of threatened species. Diseased animals can be taken, as well as those that have killed livestock or threatened human life. In Minnesota, livestock depredation is minimal (less than 1/10 of one percent of all livestock is effected and less than 1/3 of one percent of all farms suffer losses) and has been successfully controlled by an animal damage control program administered by the Fish and Wildlife Service.

Without a practical need for an amendment and with much risk presented by an amendment, we must oppose any amendment to the Endangered Species Act or Committee Report language which would permit or encourage further taking of threatened wildlife.

(For additional detail, please see Sections II and III of this statement. Portions of the above section have also been used by the Endangered Species Reauthorization Coalition in the ESA Reauthorization Bulletin #12.)

C. HELPING PRIVATE LANDOWNERS WHO CHOOSE TO PROTECT THEIR ENDANGERED PLANTS

Since the Act was signed into law protection for listed plants has been minimal. In 1982, protection against collecting on federal land was provided in an amendment to the Act but

protection against intentional harm on federal lands and any taking on private land have not been addressed by the Act.

Unfortunately, most state and local police forces have little expertise in botany.

While it is quite possible to construct an argument that federal law could and should prohibit any taking of listed plants anywhere; to avoid running afoul of the constitution, we recommend that the Act forbid the intentional harming of listed plants on federal land and the taking, as defined in the act, of listed plants on land other than federal land without the express consent of the landowner. Landowner could be defined as the person who has a right to dispose of the plants on the land under state law, be that tenant, landlord, manager, or other interest holder. It should be clear that in no way is the intent of Congress to affect or override private rights of ownership. It is simply to recognize those in the Act and to bolster those rights by providing the expertise of the agency and sanctions of federal law for those who wish to conserve their endangered plants.

Even if this is not possible the Committee Report should contain strong language directing the Service to use its current authority more aggressively. That language could direct the Service to:

1. Implement a process for regular communication with nature conservancy groups, Heritage programs, wildlife organizations and garden clubs concerning the status of endangered and threatened plants, particularly those on private lands;
2. Implement voluntary management agreements or programs to provide advice and assistance to private landowners with listed plants;
3. Implement a program to alert and assist law enforcement agencies that have jurisdiction over the theft, destruction or illicit trade in private plants. This should include the aid of Service botanists, field and forensic personnel;
4. Develop and implement direct approaches for protecting plants such as acquiring from willing landowners small federal interests in plants on private land (already authorized under Section 5) so that collectors can be prosecuted under the existing federal criminal statutes for theft of federal property; Pursue the acquisition of easements related to plants on non-federal land which would provide a basis for protecting those plants. Pursue civil fines when evidence of the plant's federal origin is considerable but insufficient to meet the criminal standard of proof; and

5. Report to the Congress by September 30, 1986 on the status of plant protection and the enforcement of plant protection provisions.

D. MONITORING CANDIDATES SPECIES; CONFERRAL WITH DUE PROCESS FOR AFFECTED PARTIES

In order to provide some protection for category one candidates, which have already been determined to warrant listing, we suggest adopting the procedure of "conferral" now used for proposed species. This less formal and non-binding form of consultation would provide notice and an opportunity for advance planning. The Service would be in a good position to determine whether an emergency rule were warranted after conferral with the action agency.

Some have expressed concern about a lack of public notice inherent in candidate conferral, but the Service now provides public notice of its decision to move a candidate from category two status where it is studied, to category one status. Furthermore, the affected party in an administrative proceeding always has an opportunity to examine and rebut any evidence or assertion in the record. The Service and other agencies already engage in occasional conferral over candidates, but the hit or miss quality of that process to date has been troublesome. It should be a regularly required process, though less rigid than formal consultation. The rules adopted by the Service to implement candidate conferral could specifically provide that interested parties may present data concerning the intended eventual listing or habitat. Furthermore, if necessary, the Service rules could provide a period of 60 or 90 days during which any party that is interested or that would be affected by a candidate conferral process could augment or rebut data or assertions concerning the impact of a proposed project or action on the candidate (This process could be used in Section 404 permitting by the Army Corps of Engineers under the Clean Water Act, for example.)

Rules should make clear however, that notice of conferrals is to be provided and records kept in the regions and in Washington since the Service has not been particularly good about keeping records of its consultations in Washington.

It would also be advisable to extend the period of emergency rules from 240 to 360 days in light of the number of emergency rules (seven out of eight) that have expired in recent years before final rules could take effect.

The Service should also monitor generally the status of candidates and the effect of non-federal actions on those candidates, be required to issue emergency rules to protect candidates that face significant risks.

E. PREVENTING UNWARRANTED CONTAINMENT OF NATURAL AND EXPERIMENTAL POPULATIONS

In recent months there has been continued discussion particularly among interests affected by predators of the concept of zone management for such natural populations of listed species as sea otters, grizzly bears, and wolves. A certain amount of zone management is understandable and perhaps necessary in some cases, but some have suggested amending the Act to allow or require the "control" or killing of endangered or threatened predators in zones furthest from designated recovery areas.

This idea flies in the face of the Act's primary intent which is not to establish strictly limited outdoor zoos, but to encourage natural recovery in natural ecosystems. The Act already allows for the control of individual predating animals from threatened populations and even more flexible controls perhaps on experimental populations.

The result of a broadly worded amendment would be to turn the act on its head and say that a species has no right to exist outside of an "official" recovery area. That would foreclose the most efficient and natural progress toward delisting possible natural self-regulated recovery.

Therefore, Defenders would oppose any such sweeping amendment and urge caution in adopting even a mild form of such a process for any individual species such as sea otters.

The best way for the Committee to ensure that a unique sea otter amendment is not taken by the Service or others as an example of how most experimental populations and their natural source populations should be managed is for the Committee to make that very clear in its Report on the bill. In fact, it is the consensus of the ESA Reauthorization Coalition that such Report language is essential for the proper understanding of the sea otter amendment.

F. WESTERN WATER AND OTHER SECTION 7 CONSULTATIONS

The consultation process may be the backbone of the Act. Yet the spine of the Service has not stiffened in recent years. In fact, the Service seems to bend over backward to find "no

jeopardy" in the fact of distinct and clear threats to endangered wildlife. The "Windy Gap" process of allowing projects on the Colorado River to proceed without significant modification is one example. Before addressing that issue further we should note that the Service has failed repeatedly in consultations to protect other species such as the Red-cockaded woodpecker. It seems that in many cases, the Service will take the position that as long as some viable populations remain, any taking of members of the species, particularly by habitat modification, is permissible despite the contrary intent of the Congress as reviewed and verified by the Courts and as reflected in the regulations.

We are increasingly concerned about the lack of attention given by the Environmental Protection Agency to the effects of pesticide use on wildlife, including threatened and endangered species. For instance, in late 1983, a juvenile California condor was killed by an "M-44," a coyote control device containing the toxic sodium cyanide. Only after this incident were steps taken to protect the condor from these devices despited earlier warnings. In 1980 and 1981, six endangered grey bats were killed by the pesticide dieldrin, years after use of this substance was sharply curtailed by E.P.A. As the agency in charge of regulating use of pesticides, EPA should have investigated these incidents. There is no evidence of any action on E.P.A.'s part. It is not unreasonable to suspect that many more such incidents have been and are contributing to the continued decline of threatened and endangered species with insufficient consideration by the FWS as well.

The Service in recent years has been loathe to enforce the Act in regard to Western water. However, it should be acknowledged that the Act has in effect provided Federally appropriated water rights, or at least the ability to recognize and preserve in-stream flows, in order to protect listed species and their habitats. This is at it should be, for habitat protection is coequal with and necessary for the actual recovery of listed species. The question, however, is "Who should give up the use of what water in order to maintain the integrity of the ecosystems and the species on which they depend?"

Since 1981, the Service has been using an approach in which no one gave up very much in the way of water rights or uses. The Service apparantly plans to give - up its rather unpopular and ineffective "windy gap" approach to consultations on the Colorado, which allowed depletion to continue in exchange for promises of research money to help determine when depletions should stop. This pitted a few scientists in a race against many developers, who are aided by much larger direct and indirect federal subsidies in many cases than the Service's Endangered Species Program has ever hoped to see. The Windy Gap process

almost turned the Act on its head by acknowledging a risk to certain species but allowing the threat to go forward until some point in the future when the Service might find not only jeopardy but actual destruction of species or habitat. The question here is, "With what will the Service replace windy gap?"

The Service has indicated that it believes it can force federal water projects, such as those of the Bureau of Reclamation, to schedule or increase releases of water. That may well be entirely appropriate, but the Service should not provide "no jeopardy" opinions for water-depleting projects based on great but uncertain expectations of replacement water from other sources.

The basic reality of western water is that the current western water law and practice together encourage the wasteful use of many times the water needed to protect the remaining species in their habitats. Further development would create severe allocation problems, even without the Endangered Species Act which is now in effect serving to assist the west in avoiding short-sighted resource management practices.

The answer to this conflict therefore, may lie in reform of the system that controls water allocations in the west. Such reform could serve to discourage wasteful uses and provide both the water needed for maintaining habitat and the water that is needed for economically viable agricultural, energy and other uses. Recent developments in interstate sale of water and the growing need to reduce the deficit by cutting federal subsidies both indicate a trend toward more efficient and realistic allocation of western water. This may require more changes in western states' water laws, in federal compacts concerning its distribution and allocation, and in some federal law.

In the meantime, there are many ways to avoid harm to species, through operation and design alternatives. The Act also provides an exemption process, as yet unused by western water developers, for truly urgent national needs that cannot help but endanger a species. In the final analysis we all must acknowledge, in the interest of our own survival and that of the west as we know it, that the integrity of western rivers and riparian habitat is itself a national necessity and that the Endangered Species Act was just the first body of law to recognize that.

G. ASSISTING LAW ENFORCEMENT

In early 1985, the Eighth Circuit Court of Appeals ruled in the case of U.S. v. Dion that the Act banned commercial take of listed species by Indians but not non-commercial take by an

Indian on his reservation where a treaty had implied a general right to hunt. The ninth circuit had earlier held that such implied general treaty rights could be overridden by general statutory provisions as in the Act.

The case of U.S. v. Dion sets before the Congress in 1985 the problem of Circuit Courts divided on the question of whether Indian Treaties which expressly or impliedly allow for traditional hunting and fishing rights are affected by the Endangered Species Act.

It is the position of Defenders that the Act should provide for such traditional religious uses as will not endanger the listed species but that this should be determined by the Secretary of the Interior through rulemaking and permitting procedures. Unregulated take is too dangerous when it affects such species and there is no objective reason why it should not be possible to provide for both recovery of the species and for the full exercise of first amendment and necessary treaty rights.

However, it may be useful to create a council including Native Americans to assist in making determinations under any permitting process. Such joint councils have greatly aided fishery resources allocations. More specifically on point is the precedent of the Alaska Eskimo Whaling Commission which assists the Marine Mammal Commission in regulating the subsistence take of endangered bowhead whales.

In fisheries and other areas where incidental take may be a problem, Indians and Tribes can apply for incidental take permits just like any other entity.

Recent experience with endangered Florida panthers and other species suggests that the Service should make greater use of its authority to provide rewards to private parties for law enforcement assistance. The Service should also explore other means of encouraging private citizens to assist in the enforcement of the Act. Recent surveys have shown that in at least one area of the country where listed species occur, more than 40% of the population reports knowing someone who has killed such an animal, in this case, the wolf in northern Minnesota. Information on offenders must surely be available. That is not to say that massive sweep operations are needed. A few prosecutions of the most egregious or repeating offenders would probably be sufficient to let people know that the Act is law and that a violation of federal law is serious.

In regard to enforcement in general, a law is no better than its enforcement. This is evident in the relative lack of prosecutions for illegal collecting of and trade in listed poaching of grizzlies and wolves, and the fact that private taking by means other than hunting, fishing or nest-robbing seems rarely the subject of civil or criminal enforcement under section 9 of the Act. Therefore, less direct takings have been allowed to proceed with apparant impunity, even without the incidental take permits provided for in the Act.

Further resources are needed but another requirement is a more aggressive attitude on the part of enforcement officials and policy makers.

H. SUMMARY

Defenders analysis of and experience with the Act and its implementation indicate that the Act itself is basically sound but the implementation is flawed. The Congress, and the authorizing Committees in particular must instruct the Administration to improve its record in applying the law. That record can be improved even without the increased appropriations we feel are warranted and badly needed. The Act itself would be improved with the protection of plants on the land of willing landowners, the clarification that not even Indians may legally contribute to extinctions, a monitoring system with use of conferral and emergency rules to stop serious declines or extinctions of candidate species, and a doubling of the funding authorizations.

[Defenders of Wildlife is one of the several organizations in the Coalition whose views were presented by Mr. Michael Bean of the Environmental Defense Fund. This statement supplements that of Mr. Bean and the Coalition.]

Thank you Mr. Chairman, that completes my statement, however, I would appreciate it if the following documents could be included in the record as part of Defenders' written statement.

II. MEMORANDUM ON WOLF AND GRIZZLY SPORT SEASONS

III. STATEMENT ON GRIZZLY MANAGMENT IN MONTANA

IV. REVIEW OF ESA IMPLEMENTATION THROUGH 1984

EDITOR'S NOTE.—The documents II-IV mentioned above may be found in the subcommittee files.

PREPARED JOINT STATEMENT OF THE ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB,
TROUT UNLIMITED, FRIENDS OF THE EARTH, AND COLORADO AUDUBON COUNCIL

INTRODUCTION

This statement was prepared by a number of national and regional conservation organizations with offices in the Rocky Mountain West. We appreciate this opportunity to acquaint the Committee with our views on the Endangered Species Act, especially as it applies to protection of threatened and endangered species in Colorado and its neighboring states.

The purpose of our statement is twofold. First, we want to express our strong support for reauthorization of the Endangered Species Act for five years. That Act embodies this nation's commitment to assuring the survival of plant and animal species that are threatened with extinction, and its reauthorization is of the highest priority. Second, we would like to address, in some detail, a specific problem that has arisen with the Fish and Wildlife Service's interpretation of the Endangered Species Act.

Three species of fish, listed by the Secretary of the Interior as endangered, have evolved in and depend upon the natural habitat of the Colorado River system for their continued existence. Those species are the Colorado squawfish, the humpback chub, and the bonytail chub. Dam construction and water depletions have largely eliminated the habitat available to these fish species, which are on the brink of extinction. In the case of the bonytail chub, perhaps only one population remains in the wild. More important, the Fish and Wildlife Service and other agencies lack scientific information that is vital to assessing the impacts of water development on these species.

Nevertheless, the Fish and Wildlife Service has adopted a policy that permits continued issuance of so-called "Windly Gap" biological opinions that sanction additional depletions of water from the Colorado River without being able either to identify the effects of those depletions on the listed species, or the effectiveness of measures proposed to "offset" the effects of the depletions. This approach promises neither to halt the continuing decline of these species nor to improve their position, and is therefore inconsistent with the clear mandate of the Act. We urge Congress to disapprove of this practice.

STATUS OF THE SPECIES

The Colorado squawfish presently occupies only about 800 river miles in the Colorado River system—which represents only twenty-five percent of its original range. While the squawfish historically was found throughout the warm water reaches of the entire Colorado River basin, it now is found only in the upper Colorado River above Glen Canyon Dam. The reduction of the squawfish habitat is graphically and dramatically depicted by the accompanying map.

The squawfish is highly mobile and its habitat requirements vary by life-stage. Spawning occurs in early or midsummer when water temperatures reach 70° F, and takes place near the backwater areas that serve as nurseries. Behnke & Benson, "Endangered and Threatened Fishes of the Upper Colorado River Basin" (1983) (we have enclosed a copy of this document with this statement). Conversely, adult squawfish favor deep areas of large river channels from which they can move out to adjacent reaches and feed on other fishes. Id.

Squawfish populations have declined dramatically since construction of Hoover Dam in 1930 and Flaming Gorge and Glen Canyon dams in 1963. Nevertheless, squawfish continue to migrate over long distances and major spawning areas have been identified in the lower Yampa River and in the Colorado River upstream of the Utah border. The Green River remains an extremely important area for young squawfish and as a nursery area.

Much less is known about the humpback chub, partly because it is so rare. Its rarity may be the result of its highly restrictive habitat requirements: the species is found only in swift, deepwater areas of the Colorado and Green Rivers. It is assumed that the humpback chub historically occupied an area nearly as extensive as that of the squawfish. Today the humpback chub is found principally in the mainstem Colorado River in far western Colorado and in the Green River downstream of its confluence with the Yampa River.

Finally, the bonytail chub, which once was probably the most abundant species in the main river channels of the Colorado and Green Rivers, has undergone the most precipitate decline. "This species is now the rarest of the native fishes and the species in most imminent danger of extinction." Behnke (1983).

One of the most obvious factors contributing to the decline of these three species was the construction of large dams and reservoirs that eliminated hundreds of miles of habitat, created barriers to migration, and changed the flow regime and water quality of the rivers downstream of the dams. Behnke (1983).

In addition, land use practices, irrigation withdrawals, and channelization have drastically changed flow patterns and channel morphology and have eliminated the quiet backwater nursery areas. As a result, suitable habitat is no longer available in much of the river system, and the future of the remaining habitat is in doubt.

The effects of consumptive uses of water on endangered fishes of the Colorado are incremental, but are equally as serious as the effects from dam construction. Thus the Fish and Wildlife Service has concluded that additional depletions of water "may contribute to the extinction of these fishes unless offset by active conservation measures to provide for the continued existence of these species in their natural habitats." Biological Opinion on GCC Joint Venture Water System (Aug. 24, 1984).

THE FISH AND WILDLIFE SERVICE'S CURRENT APPROACH FOR SECTION 7 CONSULTATIONS

In 1981, the Fish and Wildlife Service developed a conceptual management approach for protecting the Colorado River's endangered fishes while permitting water development projects to proceed. This approach was formulated in conjunction with planning for a water project known as "Windy Gap" on the Colorado River in north-central Colorado and the Service has used the Windy Gap approach in preparing biological opinions at least thirty times since then.

In the Windy Gap biological opinion, the Service acknowledged that three major interacting factors explain these species' decline: creation of reservoirs, water diversions from the streambed, and environmental changes brought about by creation of impoundments and diversions of water. More precisely, the Service found that "[w]ater diversions from the Colorado River Basin have drastically altered flow patterns, water quality perimeters [sic], and river channel characteristics, and eliminated the backwater nursery areas to a point that much essential habitat is no longer present." Thus, the Service concluded that while incremental impacts associated with diversions are less dramatic and less visible than are impacts associated with dams, the end result of the two activities "is similar in relation to the habitat needed for the continued existence of the endemic species."

Because water development projects such as Windy Gap reduce the likelihood of the recovery of the endangered fish species, the Service's approach has been to require the project sponsors to offset or compensate for actions that result in jeopardy of listed species. Essentially, the Service determined that a twenty-five million dollar conservation effort is needed to protect these species. Working from that estimate, the Service then assesses against project sponsors a portion of those costs, based on the quantity of water to be developed relative to the state's entitlement under a set of interstate compacts. The conservation measures can involve additional research, habitat modification, and so on.

Since 1977, the Service has completed over eighty section 7 consultations on water-related projects in the upper Colorado River basin: thirty-three of the biological opinions have used the "Windy Gap" approach. In total, these projects involve depletions of well over one million acre feet of water. The last four projects alone entailed potential depletions from the Colorado River of nearly 60,000 acre-feet per year. Moreover, the Fish and Wildlife Service anticipates that within the next year it will be faced with at least twenty-eight additional consultations for projects in the upper river basin that could use an additional 143,600 acre-feet of water per year.

Our concern with the Fish and Wildlife Service's Windy Gap approach is simple. A biological assessment completed by Simons, Li & Associates in 1984 concluded that several studies conducted between 1960-1965 and 1979-1981 indicate that juvenile and adult Colorado squawfish have declined 60 to 70 percent, and young-of-the-year have declined 94 percent over the past twenty years. Indeed, there appears to be an informal consensus among the experts in this field that these fish species are continuing to decline.

Nevertheless, the Fish and Wildlife Service has not identified the effects of depletions on the continued existence of these species and has not been able to assess the effectiveness of measures that are proposed to offset or compensate for the adverse impacts of water depletions. There has been no analysis of the combined effect of existing depletions and planned future depletions (whether speculative or not) on these endangered species. Instead, the Service is continuing to issue biological opinions while conceding that each successive depletion reduces its management flexibility in the future, including its ability to fashion a comprehensive conservation plan to expand populations of these endangered fish species.

We are very concerned that the Windy Gap approach will nickel-and-dime the Colorado River's endangered fish species to extinction because there is no comprehensive conservation plan. The Windy Gap approach essentially resolves questions of scientific uncertainty in favor of development rather than in favor of species faced with extinction. The risks to the species' continued existence from this piecemeal approach are very high and are wholly inconsistent with the spirit of the Act's mandate to prevent the extinction of endangered species. To avoid the loss of these species, the Congress should strongly urge the Fish and Wildlife Service to discontinue its use of the Windy Gap concept in assessing a proposed action's effect on the continued existence of these fish species. The Service should, instead, be making decisions on individual proposals based on the quality of scientific information available to the decisionmaker and the level of the risk to the species entailed by the proposal.

In some cases, such an approach may result in the issuance of biological opinions with jeopardy findings. In most cases, however, such an approach will not work an undue hardship on the sponsors of water development projects in the Colorado River basin, especially since a jeopardy finding could be reevaluated in the context of a comprehensive conservation plan. Moreover, many of the projects that have been evaluated over the last four years under the Windy Gap model have been speculative in nature, while many others were federal projects where the costs of delay would not be directly borne by private parties.

In the case of many projects that have received Windy Gap nonjeopardy opinions, actual development in the next decade, or even in the next several decades, is problematic at best. For example, the White River Dam in Utah received its opinion from the Service in 1982. Yet that project is "on hold" and its future is inextricably tied to a resurgence of the oil shale industry. Similarly, the Getty/Cities Service/Chevron Shale Project in Colorado, received a no jeopardy opinion for development of up to 73,000 acre-feet of water per year. But that project is unlikely to be built before the turn of the century. And beyond the oil shale industry, Congress several times has refused to authorize appropriations for the Dominquez project in Colorado, and this project is "on hold." In a sense, the sponsors of these projects are "banking" section 7 consultations without any real expectation of beginning construction in the near future.

In short, we are skeptical of the effect jeopardy opinions would have on projects that have no realistic probability of being initiated in the next decade or more. Conversely, there is little doubt that additional depletions threaten the habitat, and the continued existence of the endangered fishes of the Colorado River. When viewed in that light, we have no hesitation in concluding that the most important goal, at this time, is the development of a scientifically sound conservation plan that permits the Fish and Wildlife Service to evaluate the effects of depletions in endangered species and the effectiveness of measures designed to compensate for those adverse effects.

Discontinuance of the Windy Gap process has special merit in cases where the entry seeking completion of a section 7 consultation is a federal agency, which has an independent duty to use its statutory authorities to promote the Act's purpose of conserving endangered species. For instance, the Bureau of Reclamation will suffer no real harm if a biological opinion results in a jeopardy finding on sale of additional water from a reservoir, especially if that finding can be reevaluated in the framework of a conservation plan. A concrete example of this kind of situation is the Bureau's pending request that the Service complete its biological opinion on sale of water from Ruedi Reservoir, in Western Colorado.

The Bureau constructed Ruedi Dam and Reservoir on the Fryngpan River as part of the Fryngpan-Arkansas Project. The purposes of the dam are to provide replacement water for senior downstream diverters, and to provide regulatory storage for users in western Colorado. In May 1981, the Bureau executed water service contracts with four entities to supplement their existing water suppliers, including the sale of 6,000 acre-feet to Exxon Company and much smaller quantities to several local government entities. We understand that the Bureau is now insisting that the Service complete its review of a proposal to conduct a second, and much larger round of water sales from Ruedi Reservoir.

However, the Bureau has not demonstrated a need for a second round of water sales—in fact, while the oil shale industry is the most likely purchaser of water from Ruedi, the state of that industry clearly does not militate for swift action on sales of water from Ruedi Reservoir. The finding of jeopardy for projects such as this would cause little or no hardship to the project's sponsors—a federal agency—but would provide the Fish and Wildlife Service with much-needed breathing room to systematically evaluate and determine the habitat requirements of the endangered fishes, and alternatives for protecting and recovering those species.

Finally, the Fish and Wildlife Service has some flexibility in the consultation process to avoid issuing jeopardy opinions that would, in fact, block projects in the face of scientific uncertainty. Especially in the case of multi-stage projects, the Service can and should issue nonjeopardy opinions that make clear that if new information develops suggesting that endangered species might be threatened, section 7(d) of the Act would prohibit further irreversible commitment of resources until consultation is reinitiated. Such an alternative could be particularly useful in cases in cases such as this where the Service simultaneously is seeking to prevent further declines in endangered species and to formulate a plan to rebuild the species.

CONCLUSION

Our first and foremost goal is to prevent the extinction of the endangered fishes of the Colorado River, and to restore them to healthy populations that do not require intensive management. The Windy Gap concept developed by the Fish Wildlife Service entails excessive and unnecessary risks of extinction for these species. This Committee should strongly urge the Fish and Wildlife Service to discard this approach, in favor of one that is capable of examining the effects of a project on endangered species and their habitat and that resolves uncertainties in favor or protecting those species. It is equally imperative that the Fish and Wildlife Service step back and take a systemwide look at the status of these species and their habitat needs so that the Service will have the best available scientific evidence for conducting biological opinions in the future.

As part of this program, the Service should continue its efforts to formulate a comprehensive conservation plan for the endangered fish species that will reverse these species' decline and permit the Service and others to determine with a measure of certainty the effects of future development on these species. Moreover, we are confident that the Act's purposes can be achieved in concert with development of water resources in the West, and we encourage and support efforts to seek out innovative approaches for reconciling the needs of these fish species with future water resource development in the Colorado River basin.

However, it is important to note at the outset that preservation of these endangered fish species almost certainly will require some level of minimum instream flows and protection of the natural habitat upon which these species depend. Reliance on artificial measures such as hatcheries and spawning channels would not only be imprudent, but would be inconsistent with the Act's goal of protecting the ecosystems upon which threatened and endangered species depend.

Submitted by: Daniel F. Luecke, Senior Scientist, Environmental Defense Fund, Rocky Mountain Office; James B. Martin, Staff Attorney, Environmental Defense Fund, Rocky Mountain Office; Maggie L. Fox, Sierra Club, Southwest Office; Jim Belsey, Colorado Trout Unlimited; Connie Albrecht, Friends of the Earth; and Ron Harden, President, Colorado Audubon Council.

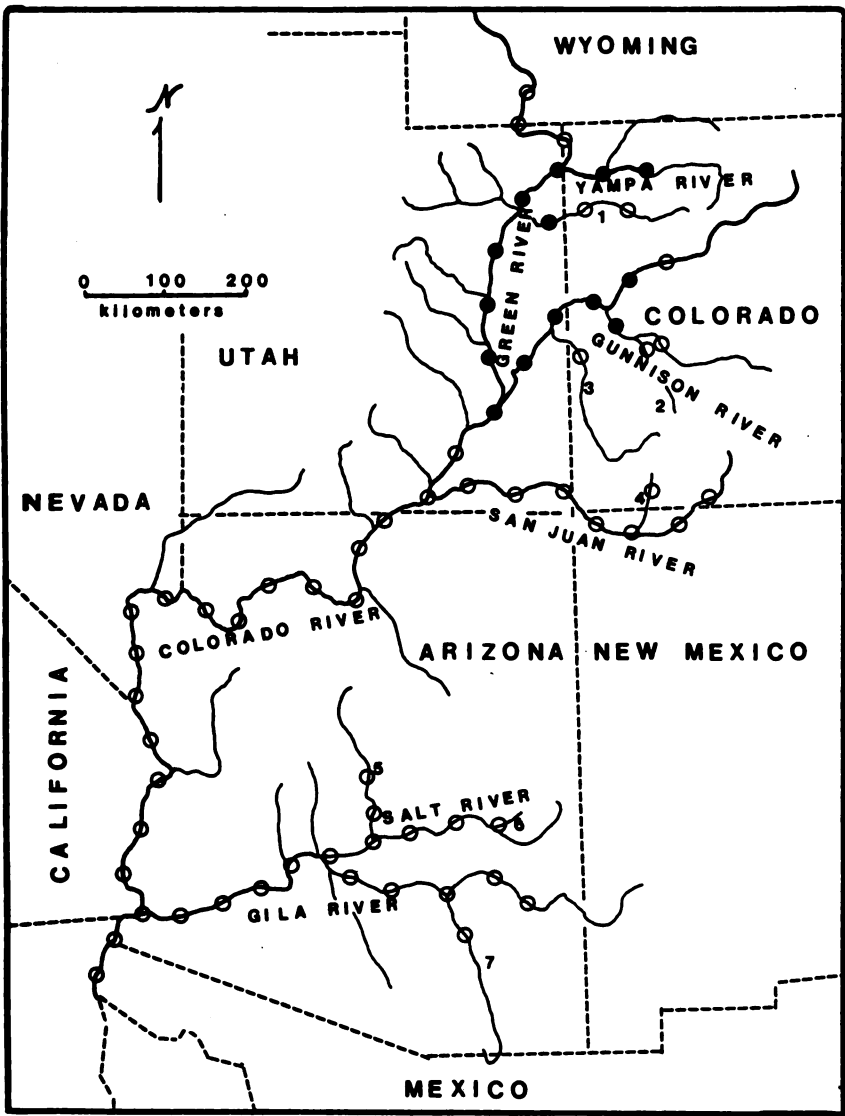



Figure 1. Historical (all circles) and present (solid circles only) distribution of the Colorado squawfish in the Colorado River basin. The numbers refer to the following rivers: 1) White River, 2) Uncompahgre River, 3) Dolores River, 4) Animas River, 5) Verde River, 6) White River, 7) San Pedro River.



Figure 1.  Present distribution of the Humpback chub (*Gila cypha*) within the Colorado River drainage.

**Endangered and Threatened
Fishes
of the
Upper Colorado River Basin**

by
R.J. Behnke
and
D.E. Benson

Illustrations by Mrs. Doris Rust

Funding provided by

The U.S. Department of the Interior Fish and Wildlife Service

PREFACE

Endangered species often generate controversies, raise emotions, and polarize opinions when the preservation of endangered species conflicts with economic development. This is particularly true for the endangered fish species of the Colorado River basin. The water of the Colorado River is in urgent demand for agriculture and energy production. The greatest known concentrations of oil shale and enormous coal deposits occur within the basin. Three species of fish, the Colorado River squawfish, the bonytail chub, and the humpback chub, are now listed as endangered under the federal Endangered Species Act. One additional species, the razorback sucker, has been proposed for listing. The Colorado state list of endangered and threatened species includes the four above fishes plus the Colorado River cutthroat trout.

It is often asked: of what good are endangered species? How can they be beneficial to man — especially fishes such as the squawfish, the bonytail and humpback chubs, and the razorback sucker, species of the minnow and sucker families that have so long been categorized as "rough" or "trash" fish that should be controlled or eliminated for the benefit of game fish? There are no simple answers to these questions. There are standard responses concerning the need to maintain species diversity in nature and diverse populations within a species and thus provide the raw material for evolution. It is true that the effects on many animal species from such chemical pollutants as DDT, PCB, mercury, and Kepone provided an early warning system to the dangers these chemicals hold for man. As such, endangered species may act as an indicator or barometer of environmental influences of potential harm to man. To many, the responsibility of preventing extinction as a result of man's influence is considered a duty of man's stewardship of the earth, and more practical reasons are not necessary.

When Congress passed the Endangered Species Act of 1973, it was in response to demands by the American people that the accelerated trend toward species extinction be reversed. It often is argued that extinction of species is a natural consequence of evolution and that man should not interfere with this natural process by preserving ill-adapted species that nature intends to get rid of. After all, the argument goes, dinosaurs, pterodactyls, and sabertooth tigers are no longer here. Who misses them? What must be recognized is the difference between slow natural rates of extinction (balanced with the slow evolution of new

species) and a highly accelerated rate caused by man's modifications of the earth's environments.

During the past century, as the human population has increased in geometric proportions and with the rise of modern technology, the human species has claimed an ever greater portion of the earth and its resources. Man has dramatically changed the original environments on an enormous scale to provide food, energy, and the amenities of life to an ever-expanding population. The creation of urban centers for living and business, the conversion of vast land areas to agricultural production (which in turn demands irrigation and dams and chemical treatment), and pollution of soil, air, and water are all aspects of the population increase of the human species that result in harmful effects to other species.

It must also be recognized that the accelerated extinction rate caused by man differs from much of natural extinction in that the extinction of a species caused by man's influence "dead-ends" an evolutionary line. Most extinct species in the fossil record are "extinct" only because of slow, gradual change in the evolutionary line. That is, continual evolutionary change led to the creation of new species. The germ plasma or hereditary material has been continuous through time, but gradually changed from an ancestral species into its descendant species. For example, the direct ancestor of man a million years ago or more is considered to be a different species from modern man, *Homo sapiens*. If man's ancestral species had become extinct by a dead-end type of extinction, rather than a gradual evolutionary change, we would not be here. This distinction between the two types of extinction — a dead-ending of an evolutionary line, as contrasted to the transformation of one species into another by evolutionary change — is critical for the continued maintenance of the diversity of life.

The purpose of this bulletin is to provide basic information on the endangered and threatened fishes of the upper Colorado River basin, the reasons for their present condition, and what is being done and what might be done to enhance their chances for survival. The federal Endangered Species Act is examined and interpreted to explain where potential conflicts may arise due to the occurrence of an endangered species.

It is hoped that this bulletin will stimulate interest and appreciation of some of the unique and

unusual fishes of the Colorado River that are found nowhere else in the world. The continued existence of these rare fishes will require the cooperation of diverse interest groups, as well as improved communication between persons of diverse fields of knowledge and expertise.

All future development will not grind to a halt because of such unusual fishes as the squawfish and the humpback chub, as claimed by some alarmists. Some delay, compromises, and modifications in future projects may be necessary, however, to maintain certain environmental conditions and avoid the extinction of the rare fishes.

Concerned citizens are urged to assist in gathering information on the fishes discussed in this bulletin. The areas involved cover vast expanses of habitat. Scientific collecting gear has not been highly effective in capturing fishes such as squawfish, razorback suckers, and bonytail and humpback chubs. Fishermen catching any of these endangered or threatened species must, according to the law,

release them unharmed; however, a report of the catch, giving size of fish and location and date of capture should be made to a local District Wildlife Manager or to a regional office of the State Division of Wildlife. Squawfish and humpback chubs are being tagged as part of current research projects. If a tagged fish is caught, the tag number should be included in the report of the catch. Such information may provide new distribution records for a species or may lead to the discovery of a species such as the bonytail chub -- now believed extinct in Colorado.

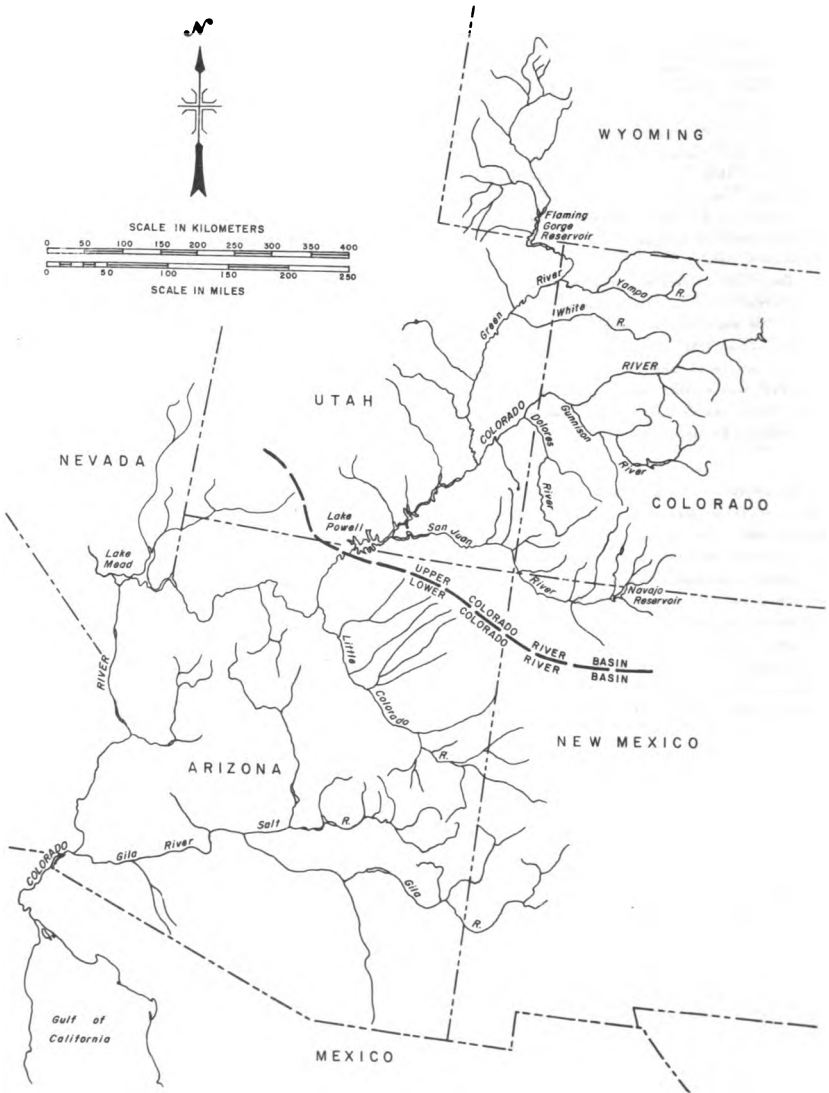
The native fishes of the Colorado River basin received little attention until recent times. The area involved is large and the physical, chemical, and biological interactions affecting the well-being of the native fishes are complex. Thus, detailed data and documentation on cause and effect relationships to explain the decline of rare fishes are largely lacking. The assessments we make here on the basis of available information, must be considered in the realm of speculation.

1982 UPDATE

Since this bulletin was written in the summer of 1980 a considerable amount of new information has been obtained. The U.S. Fish and Wildlife Service's Colorado River Fishery Project completed three years of studies on endangered species and issued its final reports in 1982. This work will be continued until 1985 as the Colorado River Fishery Monitoring Program to refine and verify aspects of the earlier study. The Colorado Division of Wildlife's endangered species monitoring and larval fish sampling program was continued in 1981 and 1982. The use of minute radio

transmitters implanted in specimens of squawfish, humpback chub, and razorback sucker, allowed for the tracking of movement which confirmed that the squawfish is a highly mobile species, capable of utilizing 200 miles or more of river during an annual cycle. The Endangered Species Act was reauthorized and amended in October, 1982.

At the end of each section we incorporate a synthesis of the new information updated to December, 1982.



ENDANGERED AND THREATENED FISHES OF THE UPPER COLORADO RIVER BASIN

INTRODUCTION

The Colorado River basin forms its headwaters high in the Rocky Mountains of northcentral Colorado (headwaters of Colorado River) and southwestern Wyoming (headwaters of Green River). Its journey from the source of the Green River to the Gulf of California extends for more than 1700 miles, and the drop in elevation exceeds 2 miles. The erosive energy of the ancient river carved tremendous canyons — including the Grand Canyon.

The official demarcation point for water use that separates the upper Colorado River basin from the lower basin is at Lee's Ferry, Arizona, about 15 miles below Glen Canyon Dam, which forms Lake Powell. This bulletin contains information on the endangered and threatened fishes of the upper Colorado River basin. The demands for water in the lower basin, however, have greatly influenced the environmental changes in the upper basin — namely, the creation of large dams and reservoirs.

Except for the mountainous areas, most of the Colorado River basin consists of arid and semiarid land, and much of it is true desert. Flows fluctuate wildly during a year and between wet and dry years. Historical flows at Yuma, Arizona, have ranged from lows of a few hundred cubic feet per second (cfs) to almost 400,000 cfs. Erosion is high in the basin, and enormous sediment loads are transported in most of the major tributaries to the mainstream of the Colorado. It has been estimated that before major dams tamed this wild river and settled out most of the sediment, more than 100,000 acre feet of sediment was deposited in the Gulf of California each year.

Thus, it can be surmised that fishes living, adapting, and evolving in this harsh environment, characterized by great extremes in flows, turbidity, velocities, and temperatures, would form a unique group of species. The Colorado River has had no broad connections with surrounding river basins such as the Missouri and Columbia for millions of years. This great time of isolation promoted the development of unique, often bizarre fishes specifically adapted to harsh environments. Most of the native fishes of the basin have long been isolated from their closest relatives and have undergone sufficient evolutionary change to be recognized as species endemic to the

Colorado River basin — that is, species that are native only to the Colorado basin and found nowhere else in the world. The Colorado River basin, as a whole, has the highest percentage of endemic species of any river basin in North America.

Among the unusual mainstream fishes specialized for living in the Colorado and Green River and their major tributaries are the squawfish, the bonytail and humpback chubs, and the razorback sucker. The squawfish is a predatory, pike-shaped minnow, reputedly reaching lengths of 5 to 6 feet and weights of 60 to 80 pounds. The bonytail chub and humpback chub, with their oddly streamlined shapes, are designed to cope with turbulent flows. The razorback or humpback sucker, one of the largest species in the sucker family, is characterized by a pronounced body hump with a sharp edge.

It was recognized long ago that much of the arid land in the basin could be converted to agriculture if irrigated. With the start of construction of Hoover Dam in 1930, a series of large dams and reservoirs were constructed during the next 30 years to insure a reliable supply of water for irrigation and for power generation and flood control. These dams and reservoirs extend along the mainstream from Imperial Dam, just north of Yuma, Arizona, to Fontenelle Dam, which backs up the Green River to near its source in the Wind River Mountain Range of Wyoming. The man-made reservoirs such as Lake Mohave, Lake Havasu, Lake Mead, Lake Powell, and Flaming Gorge Reservoir are completely new aquatic environments unlike any environment that the native fishes have evolved in or are adapted to. These reservoirs provide enormous recreational use and sustain attractive sport fishing for non-native species, introduced by man. Native fishes are essentially gone from the impoundments and from the cold, clear tailwaters below the dams.

The introduction of non-native fishes began almost 100 years ago, when it was recognized that the popular food and sport fishes of the sunfish family (such as the largemouth bass and crappie), the perch family, and the catfish family were completely absent from the Colorado River basin. Also, carp, several species of minnows and suckers, and rainbow, brown, and brook trout have been widely introduced.

The environmental alterations resulting from large dams converted a turbulent river of great extremes of flow, temperature, and turbidity into a series of great ponds from which cold, clear water is released below the dams at a relatively constant flow and temperature, year round. The native fishes were ill-adapted for these new conditions and were placed at a great disadvantage in competition with the non-native fishes.

The large dams and reservoirs, however, cannot be wholly blamed for the present rare status of the native fishes. Man's influence on the land and the watersheds from logging, livestock grazing, agriculture, and irrigation removed the natural vegetation,

caused accelerated erosion, and greatly increased the amplitudes of flood peaks. These watershed alterations, in turn, caused great changes in the size and shape of river channels and reduced the amount of lagoon or quiet backwater habitat so important as nursery areas for the native fishes. Thus, squawfish and several other native fish species disappeared from the Gila River of Arizona and were replaced by non-native fishes. Three major interacting factors explain the present status of the native fishes of the Colorado River basin: 1) Reservoirs; 2) land and water use; and 3) the environmental changes resulting from 1 and 2 which give a competitive advantage to non-native fishes.

THE NATIVE FISHES OF THE UPPER COLORADO RIVER BASIN

Because of the long and effective isolation of the Colorado River basin from invasion of fishes from neighboring basins, only 13 species of fishes (Table 1) are native to the upper basin (that is, they occurred in the basin naturally before man introduced new species). Table 1 lists the common and scientific names of the native fishes and their status on the federal and Colorado state lists.¹

The seven species that occur in headwater streams (cutthroat trout, mountain whitefish, the two sculpins, the two mountain suckers, and the speckled dace) also are native to other river basins such as the Columbia and Missouri river basins and the Great Basin (several separate basins where the streams never reach the ocean but drain to internal sumps). This distribution indicates that these species have invaded the Colorado River basin (or escaped from it) in relatively recent geological times, and have not been isolated long enough to evolve into different species. The remaining six species — squawfish, three chubs, and razorback and flannelmouth suckers — are endemic species. They have been isolated much longer, and have evolved into species markedly different from their nearest relatives in other river basins. Fossils of some endemic species more than 3 million years old have been found. All of the six endemic species also occur (or did until recently) in the lower Colorado River basin. Of the seven native but nonendemic species, only the speckled dace and the bluehead mountain sucker occur in the lower basin.

The native species have adaptive specializations that enable them to live in different environments. They are associated with specific types of habitats and are not randomly distributed throughout the system. For example, the cutthroat trout originally was limited to clear, cold waters at high elevation before it was replaced by non-native species of trout. The six endemic species, with the exception of the roundtail chub, were largely restricted to the large, main river channels of the Colorado and Green rivers and their major tributaries, such as the Yampa, Gunnison, and San Juan rivers below the foothills, where the water is warm in the summer. The roundtail chub's optimum habitat seems to be the intermediate size tributary streams.

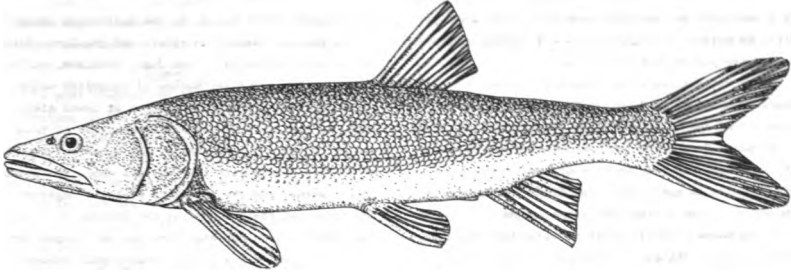
Table 1. Common and scientific names of the native fishes of the upper Colorado River basin, and status of the species that are endangered or threatened.

<u>Family and common</u>	<u>Scientific</u>	<u>Status^{a/}</u>	
		<u>Federal</u>	<u>Colorado</u>
<u>Salmonidae: Trout, whitefish and grayling family</u>			
Colorado River cutthroat trout	<u>Salmo clarki pleuriticus</u>		T
Rocky Mountain whitefish	<u>Prosopium williamsi</u>		
<u>Cyprinidae: Minnow family</u>			
Colorado River Squawfish	<u>Ptychocheilus lucius</u>	E	E
Humpback chub	<u>Gila cypha</u>	E	E
Bonytail chub	<u>Gila elegans</u>	E	E
Roundtail chub	<u>Gila robusta</u>		
Speckled dace	<u>Rhinichthys osculus yarrowsi</u>		
Kendall Warm Springs dace	<u>Rhinichthys osculus thermalis</u>	E	
<u>Catostomidae: Sucker family</u>			
Razorback sucker	<u>Xyrauchen texanus</u>		E
Flannelmouth sucker	<u>Catostomus latipinnis</u>		
Bluehead mountain sucker	<u>Catostomus discobolus</u>		
Mountain sucker	<u>Catostomus platyrhynchus</u>		
<u>Cottidae: Sculpin family</u>			
Mottled sculpin	<u>Cottus bairdi</u>		
Paiute sculpin	<u>Cottus beldingi</u>		

^{a/} E: endangered
T: threatened

Great changes in the original river environments of the Colorado River basin have favored the non-native fishes. More than 30 species have been introduced into the upper basin and now dominate most of the basin's fish communities. All of the 13 native fishes still occur in the upper basin but all have been depleted in numbers. Five species have been reduced sufficiently to be listed as endangered or threatened in Colorado (Table 1). The squawfish, bonytail chub, and humpback chub are also on the federal list of endangered species. These five species are discussed in detail in the following sections.

¹ The 14 fishes listed in Table 1 include 13 species with 2 subspecies of dace.



Colorado River Squawfish
Psychrocheilus luctus

Status

Endangered on federal and Colorado lists.

Distinguishing Features

This is the largest species of the minnow family native to North America. Specimens 18 inches long or longer are easily identified by their large mouth, pike-like body shape, and olive-green back and silvery-white belly. Small specimens might be confused with the roundtail chub by inexperienced persons. Confusion is promoted because fishermen in Colorado commonly, but incorrectly, use the name squawfish for the roundtail chub. Among old-timers who once knew the squawfish, the names "Colorado salmon," "white salmon," or simply "salmon" were frequently used as the common name for the squawfish. The upper jaw extends to or beyond the middle of the eye in the squawfish, but only to a point in front of the eye in the roundtail chub. Also, in young squawfish to a length of 8 to 10 inches, a dark blotch occurs on the base of the tail. This blotch is absent in the roundtail chub. Appendix I illustrates the characters useful for distinguishing the squawfish from the roundtail chub.

Life History

The largest known specimens of squawfish seen in recent years have been about 3 feet long and have weighed about 15 pounds. It appears that the present

growth rate is much less than it was under the original, unmodified conditions in the Colorado River basin and before non-native fishes became predominant over the native species. The reduced growth rate in squawfish may be due, in part, from a change in the prey species they consume, which was a result of a replacement of the larger, native prey species by smaller, non-native fishes. The possible introduction of non-native parasites, brought into the basin in non-native fishes, might also contribute to reduced growth rates. Unverified weights of 80 to 100 pounds are given in the literature. Judging by statements in the literature and from the size of squawfish bones found in ancient Indian sites, the length the largest squawfish once attained was about 5 to 6 feet. The plotting of a length and weight curve based on squawfish specimens between 1 and 10 pounds, and projection of the curve to 5- and 6-foot lengths, indicates that a squawfish 5 feet long would weigh nearly 80 pounds and a 6-foot specimen about 130 pounds. There is much room for error in such projected calculations, but it can be surmised that the largest squawfish once attained a weight of 60 to 80 pounds.

The squawfish is a predator; its food is mainly other fishes. In its first year of life, young squawfish feed on small invertebrate animals in quiet backwater areas and side channels off the main river. As

it grows, fish become more important in its diet. After it reaches a length of about 8 inches, fish become the predominant food.

The maximum age of squawfish collected in recent years is about 10 to 12 years. The fish mature and spawn at an age of 6 or 7 years and a length of 18 to 20 inches. Because no one has observed the spawning of squawfish, the precise type of habitat selected for spawning is not known. The finding of young squawfish in quiet backwater areas suggests that spawning takes place in river sections near the backwater nursery habitat. Spawning occurs in early or midsummer, when water temperatures reach about 70°F. It generally is believed that squawfish made major spawning migrations before they were blocked by dams, and that this behavior was the reason for their being called "salmon." Adult squawfish favor deep areas of large river channels from which they can move out to adjacent reaches and feed on other fishes. Squawfish and razorback suckers were the fish most highly valued as food by the early settlers and miners in the Colorado River basin. They were caught and marketed by local commercial fishermen. When they were abundant, squawfish were frequently caught on bait or lures by anglers.

The nearest living relatives of the Colorado River squawfish are three other species of squawfish native to the Columbia River, Sacramento River, and Oregon coastal rivers. None of the other species reach a size comparable to that of the Colorado River squawfish. The other species are not such strict predators (feeding more readily on invertebrate animals), and occupy a wider variety of habitats. In contrast to the Colorado River squawfish, the related species are flourishing to such an extent that they are considered a nuisance because they compete with game fishes. When reservoirs are constructed in the Columbia River basin, the Columbia squawfish often becomes the dominant species, despite efforts to control its numbers. It responds in a most positive manner to man's alteration of the environment and to the presence of non-native fishes. Although the general appearance of all four species of squawfish is similar, there obviously must be large differences in life history and ecology between the Colorado River squawfish and its relatives that have caused the Colorado River squawfish to fare so poorly when subjected to environmental change and non-native fishes.

Past and Present Distribution

Originally, the squawfish was found throughout

the Colorado River basin, in the mainstream channels of the Colorado and Green rivers and the large tributaries such as the Gila, San Juan, Gunnison, and Yampa. Historically, the distribution of squawfish would begin in the larger, warmer waters at lower elevation, at the lower limits of distribution of trout and whitefish. The habitat of the squawfish was originally shared with the bonytail chub, the flannel-mouth sucker, and the razorback sucker. Negative environmental changes causing the decline in squawfish distribution and abundance can be grouped into two categories: dramatic and catastrophic changes, such as the creation of a large impoundment; and gradual, cumulative changes from land and water use practices influencing habitat through changing flow regimes.

The advent of large mainstream dams, initiated by Hoover Dam in 1930 and proceeding to the completion of Glen Canyon and Flaming Gorge dams in 1963, caused a rapid decline in squawfish abundance and distribution. Only one squawfish has been found in the entire lower Colorado Colorado River basin since 1968. After the closure of Flaming Gorge Dam and the subsequent releases of cold water, squawfish were eliminated from the upper Green River downstream to a point below the confluence with the Yampa River. This section of the Green River, from the Yampa River to the confluence with the Colorado, is about 200 miles long and is now the greatest stronghold of the squawfish. This is the only area where successful reproduction (as indicated by the collection of young fish 1 or 2 years old) has been consistently found in the past few years. From 1975 through 1979 several adult squawfish were found in the Yampa River, upstream to a point above Juniper Canyon. In the White River, adults were frequently found in the lower reaches in Utah, and two were captured just above Piceance Creek in Colorado. In the Gunnison River, a few adult squawfish still occur in the lower reaches near the town of Whitewater. A remnant population may occur in the San Juan River between Lake Powell and Navajo Reservoir in Utah and New Mexico. Squawfish are found sporadically in the Colorado River up to Plateau Creek, about 15 miles above Grand Junction. In recent years many captures along the Colorado River have been from gravel excavation ponds connected to the main river.

Except in the Green River below Jensen, Utah, and the Colorado River below Westwater Canyon, Utah, there has been little evidence of successful

reproduction for the past several years in any of the locations where adult squawfish are found. Most specimens have been at least 6 years old or older.

Causes of Decline

The most obvious and clearly identifiable factor contributing to the decline of squawfish is the large dams and reservoirs that converted hundreds of miles of large-river habitat into great impoundments. The preservation of native fishes was not considered in the planning and operation of these projects. Squawfish and other native fishes do not reproduce successfully in large reservoirs. The adults present in the river when a dam is constructed may continue to live in a reservoir, and may thrive and grow, but the population consists of fewer, larger, and older fish each successive year until they all die of old age. The largest known squawfish caught in relatively recent times (34 pounds) was taken in Lake Mead about 35 years ago. Thus, there is no doubt that squawfish can live in reservoirs but they have not maintained themselves by natural reproduction.

Reservoirs release cold water (40° - 50°) from great depths. These cold tailwaters below dams support trout fisheries but they are avoided by squawfish. Releases of cold water from Flaming Gorge Dam effectively eliminated squawfish from 65 miles of the Green River below the dam. Only after the Green River is warmed by the flow from the Yampa River do temperatures reach 70° F or more in the summer and make reproduction possible. Cold-water releases from Glen Canyon Dam apparently eliminated the last squawfish from the Grand Canyon area of the Colorado River.

Land-use practices, irrigation, and channelization drastically alter flow patterns and river channel characteristics, and eliminate the quiet backwater nursery areas to a point that suitable squawfish habitat is no longer present. Evidently, this sequence of events led to the elimination of squawfish from the Gila River of Arizona. These gradual, cumulative impacts on habitat are much less dramatic and not as obvious as the more sudden changes created by a large dam and reservoir, but the end result can be similar in relation to the continued existence of squawfish.

In other instances, such as in the Yampa River, squawfish have declined in abundance, and virtually no young squawfish have been found for several years. Yet, no large dams are directly involved nor have any great changes occurred in the flows, temperatures, or water quality of the Yampa River. That is, for the Yampa River, no physical or chemical changes can be

pointed to as suggesting a cause-and-effect relationship acting against the squawfish. After 1968, the increasing volume of cold water from Flaming Gorge Reservoir became an effective block to squawfish moving up the Green River and into the Yampa River for spawning. This must be taken into account when considering the causes of squawfish decline in the Yampa River. However, there is good habitat for adult squawfish in certain deepwater sections of the Yampa River such as Cross Mountain Canyon and Juniper Canyon. Adult squawfish (6 to 10 years old) are found throughout the year in the Yampa River. No indication of successful reproduction and recruitment of young squawfish into the Yampa River population has been found despite intensive search. In this case, a biological change must be considered — namely, the influence of non-native fishes.

Inasmuch as non-native fishes have lived with the squawfish in the Yampa River for a long time and the squawfish formerly reproduced successfully there, one possible cause of reproductive failure in recent years might be attributable to a non-native species that has become established in the Yampa River in relatively recent times — the redeye shiner. This species was introduced from the Columbia River basin and was first recorded in the Yampa River in 1961. It rapidly proliferated to become a dominant species by the 1970's. It prefers waters of low velocity — the quiet side channels and backwater habitat that are required as a nursery area for newly hatched squawfish. Because the redeye shiner spawns earlier in the year than the squawfish, the young shiners get a head start and quickly saturate the habitat needed by young squawfish. The redeye shiner is absent from the Desolation Canyon area of the Green River, where the most consistently successful reproduction of squawfish still occurs.

However, the cause-and-effect relationship of the redeye shiner on squawfish is actually not as clear-cut as it might appear. Squawfish reproduction has been severely limited in the Colorado River above and below Grand Junction for several years; yet the redeye shiner does not occur in the Colorado River. Redeye shiners provide an abundant food supply for Yampa River squawfish. Previous studies in the Green River revealed that the redeye shiner was the major component in the diet of squawfish. The key to restoring a viable, self-perpetuating squawfish population in the Yampa River appears to be a matter of finding ways to favor reproduction and survival

of young squawfish to 2 and 3 years of age when they would become effective predators on the small non-native fishes. The evidence of harmful effects of non-native species on the squawfish is largely circumstantial and much is yet to be learned on the subject.

Prospects for the Future

When a species is listed as endangered by the federal government a Recovery Team is usually appointed, made up of state and federal biologists and often biologists from universities to develop a Recovery Plan. The objective of a Recovery Plan is to provide directions and guidelines for management. If successful, the abundance of the species will increase to a point where it is no longer endangered or threatened and can be removed from the list.

The development of a workable Recovery Plan for squawfish is not a simple matter. Although such a plan has been written, the only clearly defined program in the plan to increase squawfish abundance is artificial propagation in hatcheries. The complex issue of interaction of the squawfish with its physical and biological environment, and how various factors may be manipulated to benefit the squawfish, is included under the title of "development of habitat management plans" in the Recovery Plan. The problems of developing a workable habitat management plan and implementing it have not yet been resolved. Toward this goal, the U.S. Fish and Wildlife Service, supported by funds from the U.S. Water and Power Resources Services (formerly Bureau of Reclamation), has initiated a large-scale study of squawfish and humpback chubs. This study is designed to obtain the information needed to develop habitat management plans, to provide the basis for the planning and operation of future water development projects in the upper basin, and to seek ways in which future environmental modifications might benefit the squawfish. The U.S. Bureau of Land Management and the Colorado Division of Wildlife have also been conducting studies and monitoring programs on the squawfish.

Squawfish can be readily propagated in hatcheries. Hormone injections are necessary to induce spawning. Young squawfish feed on the same food fed to trout, and large squawfish feed on fish. Squawfish have been spawned and raised at the Willow Beach National Hatchery, Arizona. Hatchery propagation, however, must be considered only as a stopgap measure in the preservation of squawfish. It is obvious that the stocking of hatchery reared fish in areas where the squawfish once occurred but is now gone will not result in a self-sustaining population unless the factors causing the elimination of the squawfish in the first place can be reversed or modified. Ways must be found to favor successful reproduction of squawfish in natural environments. Merely trying to maintain the status quo by strict protection of habitat where squawfish still occur will not do the job of getting the squawfish off the endangered species list.

Squawfish will play an important role in the planning and operation of any future dam and water development projects in the upper basin. Flow and temperature releases from dams can be planned to favor squawfish instead of trout. Successful reproduction might be favored by the creation of artificial areas where natural nursery sites no longer exist. Methods of control and replacement of potentially harmful non-native fishes will probably be necessary in areas such as the Yampa River, before successful reproduction of squawfish can be established.

The prognosis is that the squawfish can probably maintain a healthy and viable population indefinitely in the Green River below the mouth of the Yampa as long as the present environmental conditions are maintained. The probability of increasing the abundance and distribution into other areas, where the squawfish has been eliminated or exists in only small numbers, depends on the successful application of creative and holistic thinking and work.

1982 UPDATE

During recent years a great amount of both field work and laboratory studies have been devoted to the Colorado squawfish. Radio transmitters inserted into the body cavity of large specimens allowed their movements to be tracked. Long distance movement was found to be common, especially as spawning season

approached. Some squawfish moved up the Green River into the Yampa River; down the White River, up the Green River, and into the Yampa; from the upper Yampa to the lower Yampa. One squawfish implanted with a radio transmitter in the upper end of Lake Powell in 1982, moved about 200 miles up the Colorado River to

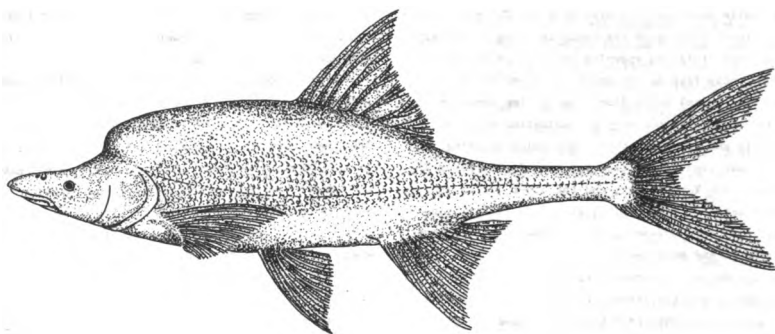
a probable spawning site near Clifton, Colorado. A significant finding of the radio tracking study indicates that preferred spawning habitat for squawfish is evidently rare in the upper basin and the spawning fish will travel great distances to find these preferred sites with the proper combination of depth, velocity and substrate type. Two major spawning areas have been identified; one area is the lower 20 miles of the Yampa River, and the other occurs in the Colorado River above the state line to Clifton. After spawning, movements of the adult fish are less pronounced and more sporadic.

The White and Gunnison rivers and the Upper Yampa River provide areas for feeding and growth for some fish. The Green River was found to be extremely important for young squawfish. Thousands of young squawfish, born the same year (young-of-year fish), were found in the Green River. Young-of-year squawfish were found in much lesser abundance in the Colorado River and lower Yampa River. The Green River below the mouth of the Yampa is the principal nursery area for squawfish. After the outlet works at Flaming Gorge Dam were modified to increase downstream water temperatures in 1978, the average summer water temperatures in the Green River increased to historic pre-Flaming Gorge levels, as recorded at Jensen, Utah. In subsequent years, a dramatic increase in the abundance of young-of-year squawfish occurred in the Green River from Ouray, Utah, to the confluence with the Yampa River.

It was mentioned in the previously written section that virtually no young squawfish had been found

in the lower Yampa River since 1968. In late 1980 fish collections in the lower Yampa River found that the non-native reddsideshiner was rare and was being replaced by the non-native red shiner, another minnow species of relatively small size. The 1980 collections also found several young-of-year squawfish in the lower Yampa River. More young-of-year were found in the Yampa in 1981 and 1982. Young-of-year squawfish most commonly are found together with red shiners, but almost never with reddsideshiners. Evidently, red shiners and young squawfish are compatible when coexisting in the same habitat.

Continued advancements have been made in hatchery propagation of squawfish. The Dexter, New Mexico, National Fish Hatchery is now devoted to the propagation of endangered and threatened species of Southwestern fishes. The Dexter Hatchery provided 30,000 squawfish of 2-3 inches in length for stocking in the Colorado River below Grand Junction during October, 1982. These hatchery-reared squawfish each had a minute magnetic tag implanted in their snout before stocking so that their subsequent movement and fate could be monitored. It was found that largemouth bass and sunfishes preyed heavily on the newly stocked squawfish where they had the opportunity. The prevalence of bass and sunfishes in the larger, deeper backwater and off-channel habitats along the Colorado River and the virtual absence of these species in the Green River, suggests why the Green River produces so many more young squawfish than does the Colorado River.



Humpback Chub
Gila cypha

Status

Endangered on both federal and Colorado lists.

Distinguishing Features

As the name implies, a prominent hump on the body immediately behind the head characterizes this species. The hump of the humpback chub differs from that of the razorback sucker in being rounded and not supported by internal bone; in the razorback sucker the hump is sharp edged and has a bony structural support. The degree of development of the hump is highly variable. The humpback chub has a fleshy snout which protrudes over the lower jaw; large, streamlined fins; and a small eye -- smaller than the eye of roundtail or bonytail chubs of similar size. The caudal peduncle (the thinnest part of the body, just in front of the tail) is thicker in the humpback chub than in the bonytail chub, but thinner than in the roundtail chub. Hybridisation of the humpback chub with both the bonytail chub and the roundtail chub has been reported. As a result, positive field identification of the humpback chub is not always possible, even for the experienced biologist.

Life History

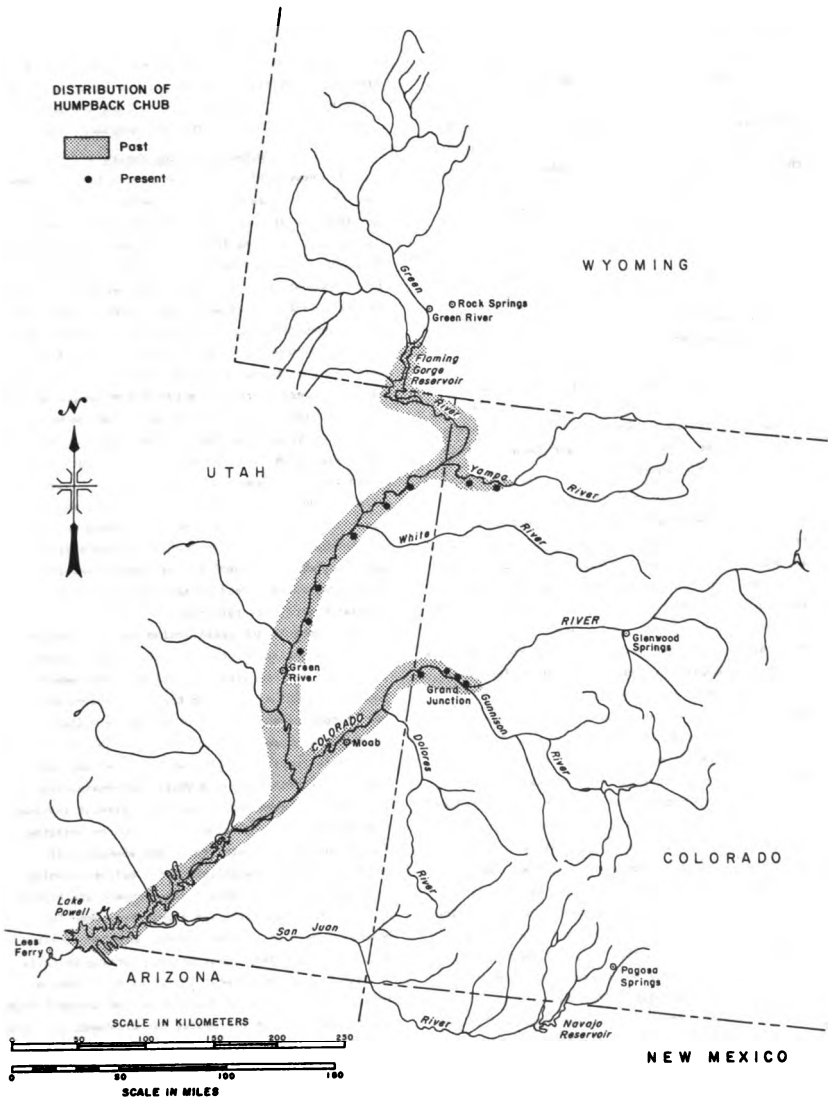
The humpback chub was not known to science until 1946, when a specimen from the Grand Canyon was described as a new species. It was never a common fish because of its habitat restrictions. Humpback chubs occur in river sections that contain swift, deepwater areas, typically in canyons. Because of its rareness,

little is known about its biology. Apparently it feeds on invertebrate animals and is sometimes caught by fishermen on bait such as grasshoppers or worms. In the Little Colorado River of Arizona, humpback chubs have been observed feeding on food scraps thrown into the water by picnickers. The humpback chub may feed on the surface of the water, although the peculiar body shape seems designed to maintain stability on the bottom in turbulent flow. Its body may be designed to facilitate up and down movements, so that it can feed on a variety of foods at different depths from the bottom to the surface.

The maximum size attained by humpback chubs is about 16 to 18 inches. Young humpback chubs prefer quiet backwater areas similar to those used by young squawfish. No one has yet observed the spawning of this species, but chubs ready to spawn were observed in water of about 65° F, suggesting that they spawn slightly earlier than squawfish. Most of the prime humpback chub habitat in the canyon areas of the basin is now covered by reservoirs. As with the squawfish, adult humpback chubs continued to live in reservoirs, but they became older and fewer until they finally disappeared because they did not reproduce.

Past and Present Distribution

The original distribution of the humpback chub is not known with certainty, but it is assumed to be



similar to that of the squawfish in the main river channels of the Colorado and Green rivers. Chubs were restricted to swift, deepwater areas, mainly in canyons, and did not occur far up tributary streams. The greatest known concentration of this species now occurs in the lower few miles of the Little Colorado River, in the Grand Canyon area of Arizona. Perhaps the releases of cold water from Lake Powell have forced most of the humpback chubs from the main Colorado River in Grand Canyon into the warmer Little Colorado.

In the upper basin, humpback chubs occur sporadically in the Colorado River up to Palisade, Colorado, about 10 miles above Grand Junction. The greatest concentration occurs in the Black Rocks area of Ruby Canyon, about 25 miles below Grand Junction, where turbulent flows create a pool almost 60 feet deep at low water levels. In the Green River, the humpback chub occurs below the mouth of the Yampa, and is concentrated in the Desolation Canyon area. It has been recorded from the lower Yampa River in Dinosaur National Monument.

Causes of Decline

Because the humpback chub had a restricted distribution and thus was always relatively rare, there is not much evidence of a decline except where reservoirs were constructed. The deepwater habitat favored by this species is not easily sampled by standard methods of fish collecting. As sampling techniques improve and more is learned about humpback chubs, more populations probably will be discovered. The most abundant known population, in the Little Colorado River, was not discovered until 1975.

There has been considerable concern that the humpback chub may lose its identity as a result of hybridization with bonytail and roundtail chubs. It now seems probable that most of the specimens formerly believed to be hybrids actually showed only normal variation in the degree of hump development. Some specimens, however, probably are hybrids. The bonytail chub now is so rare that it can be discounted as a significant source of possible hybridization. The roundtail chub, however, is common in the Colorado River in Colorado and occurs with the humpback chub in Ruby Canyon, where some intermediate (hybrid?) specimens have been taken. The roundtail chub is absent or occurs rarely in humpback chub habitat in the Green River or in the Little Colorado River. Thus, overall, the threat to the integrity of the humpback

chub species from hybridization is probably not as great as was once believed.

The deepwater areas preferred by humpback chubs are also a preferred habitat for non-native channel catfish. Large populations of catfish and carp share the Ruby Canyon habitat with the humpback chub.

Prospects for the Future

A Recovery Plan has been written for the humpback chub, but, as with the squawfish, the main emphasis was placed on hatchery propagation as the only clearly defined technique to increase abundance. Humpback chubs have been transported to the Willow Beach National Fish Hatchery, Arizona, for an attempt at artificial propagation. It is likely that additional populations will be found when more of the deepwater canyon areas in the upper basin are more thoroughly sampled. Fishermen can be of assistance in this regard by reporting catches of humpback chubs. Good humpback chub habitat is also good channel catfish habitat, and the chub can be caught on the same bait often used for catfish. Humpback chubs must, of course, be released, but the Colorado Division of Wildlife should be notified of the catch, particularly if it is outside of the Ruby Canyon area of the Colorado River. A documented angler's catch (with a photo, if possible) may provide new distribution records and lead to the discovery of new populations of this rare fish.

A humpback chub preservation and restoration program is yet to be started, but it will probably consist of the identification of all areas where populations still occur, so that the present environmental conditions in those areas can be maintained. It would be extremely difficult to establish humpback chubs where they do not now exist. They may now inhabit all suitable areas where self-sustaining populations can be maintained under present environmental conditions. The outlook is not encouraging for expanding the distribution and abundance of humpback chubs by establishing new self-sustaining populations. Their habitat requirements are highly restrictive. Possibilities should be looked for, however, where deep channel areas have been created by bridge or highway construction, forming suitable habitat beyond the present limits of distribution. In such situations, introduction of the humpback chub might result in the successful establishment of a new population. Valuable information could be obtained from experimentation designed to establish new populations. There is little doubt that the humpback

chub lost most of its best habitat to reservoirs such as Lake Powell and Flaming Gorge, but the prognosis

is that this species is not as close to extinction as was commonly believed a few years ago.

1982 UPDATE

Intensive sampling since 1980 failed to discover any new concentrations of humpback chub except for the Colorado River in Westwater Canyon, Utah a few miles below the state line. Movement of a tagged humpback chub from Westwater Canyon to Ruby Canyon, a distance of 13 miles, indicates that the humpback chub of Ruby Canyon and Westwater Canyon can be considered as a single population because of interchange between the two habitats. Most humpback chub, however, exhibited little movement as revealed by tagged fish. Most of the tagged fish that were recaptured moved less than half a mile from the point of original capture. Evidently, all life history needs can be met in the relatively restricted zone of the Colorado River in the Black Rocks area of Ruby Canyon.

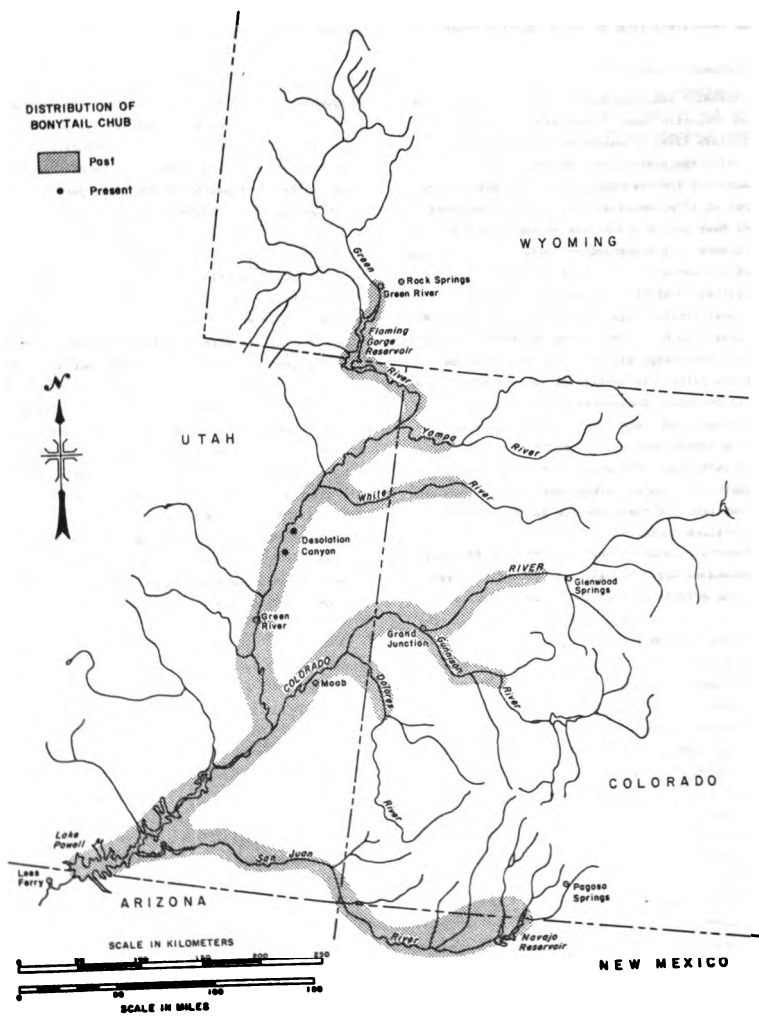
Humpback chub were found in deep areas of the Green and lower Yampa rivers in 1981 and 1982 but only sporadically. There has been no indication that any other sites contain a high abundance of humpback chub comparable to their numbers in the Colorado River at Black Rocks.

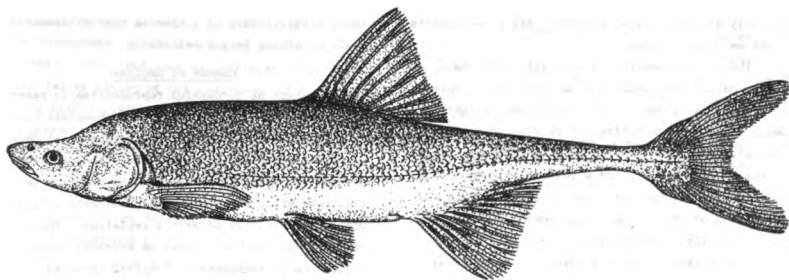
Laboratory studies demonstrated that the humpback chub is a hardy species. It proved more resistant to the effects of organic and inorganic toxic

compounds than did non-native fishes such as channel catfish, fathead minnow, and bluegill. Humpback chub tested for tolerance to total dissolved solids (salinity) showed no avoidance of the highest levels used in the experiments, 11,600 parts per million, or about one-third the salinity of the ocean.

The hardiness of the humpback chub as revealed by the laboratory studies indicate why it is so abundant in the Little Colorado River, Arizona. The environmental extremes characterizing the Little Colorado River are so harsh for fish life that few other species are able to tolerate these conditions.

The peculiar body shape of the humpback chub essentially restricts high population abundance in the upper basin to the unique deepwater habitat sites of the Colorado River in Westwater and Ruby Canyons. A flow regime for the Colorado River, necessary to maintain the unique habitat characteristics in the canyon areas, is, as yet, unknown. The U.S. Fish and Wildlife Service stocked several thousand hatchery-raised humpback chub into the Colorado River in Cataract Canyon, Utah, in 1980 and 1982 in an attempt to increase humpback chub abundance in this section of the Colorado River.





Bonytail Chub
Olla elegans

Status

Endangered on both federal and Colorado lists. Many recent studies clearly indicate that the bonytail chub is the rarest of the Colorado River native fishes and the species nearest extinction.

Distinguishing Features

Large fins and a streamlined body with a very thin caudal peduncle (the thinnest part of the body just in front of the tail) distinguish the bonytail chub. The bonytail chub might be confused with both roundtail and humpback chubs. The body is more streamlined and the caudal peduncle much thinner in the bonytail chub than in the roundtail chub. Bonytail chubs may develop a slight hump on the back, which would cause confusion with the humpback chub. The bonytail chub typically has 10 rays in both the dorsal fin and the anal fin, whereas the roundtail chub typically has 9 dorsal and anal fin rays; the humpback chub most frequently has 9 dorsal rays and 10 anal rays, but is more variable. Many unusual specimens collected in the 1960's suggested hybridization between the bonytail and humpback chubs. The current consensus is that, although some of these specimens do represent hybrids, most merely represent normal variation in the humpback chub.

Considerable confusion surrounds the identification and classification of bonytail chubs. The bonytail and roundtail chubs were described as separate

species in the 19th century, but later were considered only as environmental modifications of a single species. That is, it was believed that a roundtail chub, leaving a tributary stream for life in the main river channel of the Colorado or Green River, would turn into a bonytail chub under the direct influence of a different environment. When it was discovered that both roundtail and bonytail chubs were frequently found living together, with both of them maintaining distinctions from each other and not hybridizing, the two chubs were again recognized as separate species.

Confusion also surrounds the common name. In former times, professional biologists typically used the name 'bonytail' for both roundtail and true bonytail chubs. Consequently, many literature references to the bonytail chub refer, in fact, to the roundtail chub.

Life History

Until large dams were constructed, the bonytail chub was probably the most abundant species in the main river channels of the Colorado and Green rivers and in the lower reaches of the larger tributary rivers. The bonytail chub was most common in the open-river areas of large river channels, the humpback chub in or near deepwater areas, and the roundtail chub in tributary streams. However, where

suitably diverse habitat occurred, all three species might be found together.

The optimum habitat of bonytail chubs, based on former collections when they were abundant, appears to be the open river areas of relatively uniform depth and current velocity. This type of habitat typically consists of a shifting sand bottom water depths of 3 to 4 feet, and a relatively constant, moderately swift current. The streamlined body and large fins of the bonytail chub seem to make it well adapted to live in this type of habitat.

The bonytail chub is a relatively long-lived species. It does not spawn until it reaches an age of 5 to 7 years; like the other chub species, it spawns when the water reaches about 65° F. Little is known about the life history of the bonytail chub because it rapidly disappeared before intensive studies were made. It feeds on insects, often terrestrial insects taken on the surface of the water. Fragments of debris and algae in the stomachs of the relatively few specimens examined suggest that the bonytail chub may feed intensively after a sudden storm cause floodwaters to wash food out of tributaries into the main river channels. The maximum size attained by the bonytail chub is, in general, 16 to 18 inches. However, small numbers have continued to exist in the lower basin reservoirs, Lake Mohave and Lake Havasu, where they may attain a large size. A specimen about 3 feet long and weighing 8 pounds was reported caught by an angler in 1975 from Lake Mohave.

Present and Past Distribution

The original distribution included the large-river environments of the entire basin from Mexico to Wyoming. In the Gila River, Arizona, bonytail chubs were last recorded in 1926. They declined in the lower basin after the construction of lakes Mead, Havasu, and Mohave. Although they persisted in large numbers in these reservoirs for several years, and large numbers were observed spawning in Lake Mohave in 1954, their numbers continued to decline, because its spawning did not result in the survival of young fish. The bonytail chub was still abundant in the Green River until after the completion of Flaming Gorge Reservoir in 1963. By the late 1960's bonytail chubs became very rare. Except for the few specimens that may yet persist in lakes Havasu and Mohave, the only bonytail chubs reported in the last 3 years were from the Green River in Utah. If it were not for the stark example provided by the passenger pigeon, such

rapid disappearance of a species once so abundant would be almost beyond belief.

Causes of Decline

The lack of successful reproduction in reservoirs explains the disappearance of bonytail chubs from the segments of their former range that were converted into impoundments. Their absence from the Colorado River of Colorado and Utah and from most of the Green River where apparently suitable habitat still exists is not so easily explained. There is little in the way of documented evidence about the occurrence or abundance of bonytail chubs in the Colorado River in Colorado and Utah, but it is assumed that they were common in this large-river environment. The open river or "run" type of habitat does not seem to be extensively used by non-native fishes. Thus, the "bonytail niche" would be expected to be less impaired than the niches of some other native fishes. Yet, the bonytail chub has suffered greater declines than any other native species and is now the rarest member of the original fish fauna.

Controlled water releases from Flaming Gorge Dam eliminated the great seasonal peaks of high and low flows of the original Green River and also caused daily fluctuations due to power generation. These changes in flow undoubtedly have influenced subtle changes in channel configuration and altered optimum bonytail chub habitat. Although there are no large dams on the Colorado River above Lake Powell (except in the headwaters), tributary reservoirs such as the Curecanti Project on the Gunnison, Ruedi Reservoir on the Frying Pan River, and Dillon and Greer Mountain reservoirs on the Blue River alter the historical flow regime in the Colorado by reducing the peak spring flows. Large amounts of water are diverted for irrigation, and the return flows are diminished and the water quality altered.

The extent of the quantitative and qualitative changes in the flows of the upper Colorado River basin can be understood from the following facts and figures. The annual average virgin flow of the upper Colorado River basin at Lee's Ferry was 14,900,000 acre feet of water. By 1975, 3,823,900 acre feet of water (26% of the average virgin flow) were lost to the basin by consumptive irrigation use, transmountain diversions out of the basin, reservoir evaporation, and by cities and industry. Due to reservoir storage, the peak flushing flows of May and June are now at all time low discharge levels in the Green and

Colorado rivers. According to a 1978 U.S. Bureau of Land Management report on salinity problems in the Colorado River, irrigated agricultural lands in the Grand Valley region of Colorado return 8 tons of salts to the Colorado River for each acre under irrigation. Overgrazed rangelands in the basin, characterized by greatly accelerated erosion and high salt content, can contribute up to 30 tons of salts to the rivers per acre of watershed. Salinity concentrations have doubled and tripled in some sections of the Colorado River in comparison to virgin flow conditions. Such changes in the flow and water quality exert influences downstream on channel structure and fish habitat. The loss of great numbers of bonytail chub from the areas inhabited by squawfish must have severely depleted the potential food supply of squawfish, and may be a major cause of the reduced growth rates of squawfish in recent times.

Prospects for the Future

Realistically, the prospects for restoring the abundance of bonytail chub to a semblance of their former numbers in any part of the original range must be viewed as dim. This species is now the rarest of the native fishes and the species in most imminent danger of extinction. Biologists have been attempting

to obtain live specimens from Lakes Mohave and Havasu to hold in a hatchery for artificial propagation. Captive propagation may prove to be the only way this species can be maintained. Unless the factors causing the elimination of bonytail chub are understood, and some action is taken to modify or eliminate these factors, the restoration of the bonytail chub in its historic range cannot be expected from stocking hatchery reared fish. Even if the factors causing elimination from a river section became clearly understood, it is not likely that remedial action would be possible. For example, the dismantling of Flaming Gorge Dam to restore the original flow and temperature regime of the Green River must be considered beyond the realm of possibility.

If bonytail chub occur in an area, it is likely that an occasional specimen would be caught by fishermen fishing for catfish. If fishermen become familiar with the appearance of bonytail chub, and if a specimen believed to be of this species is caught, it should be photographed before release and reported to the Colorado Division of Wildlife. There have been no verified records of the bonytail chub in Colorado for many years. The discovery of a population would be a significant event.

1982 UPDATE

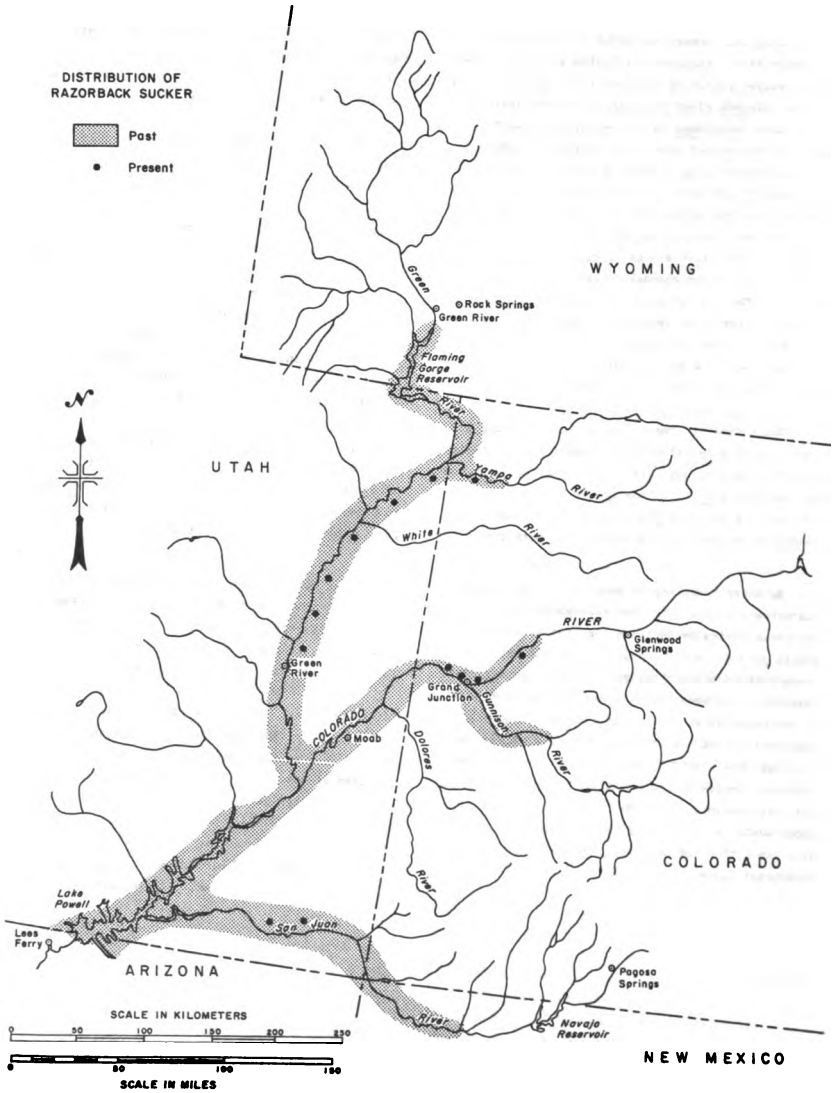
Intensive sampling by federal and state agencies and private consulting firms throughout the Colorado and Green rivers in 1981 and 1982 failed to find a viable population of bonytail chub. The only site where fish sampling obtained specimens bearing a resemblance to bonytail chub was Coal Creek Rapids of the Green River in Gray Canyon, Utah. Detailed examination of these specimens, however, indicated they were the result of hybrid combinations between humpback, bonytail, and roundtail chubs. Evidently, the last remnants of the bonytail chub species in the upper basin is in the process of being "absorbed" into populations of humpback chub and roundtail chub by hybridization.

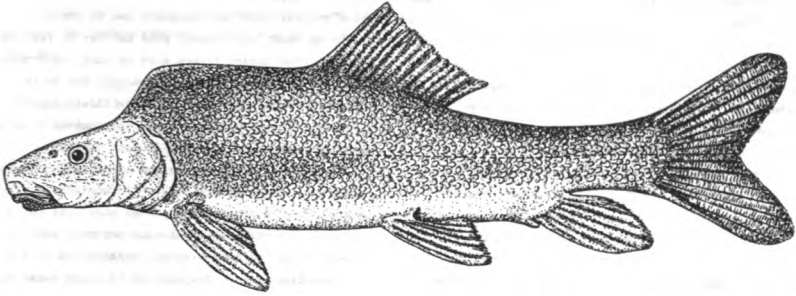
Experimental hybridization between the three chub species were carried out at the Willow Beach, Arizona, National Fish Hatchery. All hybrid combinations among the three species proved to be fully fertile, confirming their close genetic relationships.

Bonytail chub still occur in Lake Mohave. Specimens from Lake Mohave were taken to Willow Beach Hatchery to initiate artificial propagation of the species. Large numbers of bonytail chub have been produced at the Willow Beach and Dexter, New Mexico, national hatcheries. Some of these young were used in laboratory studies to determine environmental preferences and tolerances. In November, 1981, 42,000 hatchery-reared bonytail chub were stocked into Lake Mohave to supplement the natural population.

DISTRIBUTION OF
RAZORBACK SUCKER

-  Post
 Present





Razorback Sucker
Xyrauchen texanus

Status

The razorback sucker is listed as endangered on the Colorado list and has been proposed for threatened status on the federal list.

Distinguishing Features

The abrupt, sharp-edged hump on the back immediately posterior to the head identifies the razorback sucker from all other suckers and from all other fishes. The hump of the humpback chub is rounded and lacks the sharp leading edge.

The size and development of the hump is related to size and age. Young razorback suckers less than 6 to 8 inches long have only a slight hump, and might therefore be confused with the flannelmouth sucker. Hybrids between razorback and flannelmouth suckers are common in some areas. The razorback sucker typically has 14 or 15 dorsal fin rays vs. the typical 12 or 13 in the flannelmouth sucker. The razorback sucker has the larger number of gillrakers (small protuberances on the upper surface of the gill arches): typically the first gill arch has 45 or more gillrakers in razorback suckers and about 35 in flannelmouth suckers. Hybrid specimens are intermediate in the size of the hump and in other characters.

Life History

The peculiar body shape of the razorback sucker, which suggests a design for stability on the bottom in turbulent flow, may be a useful adaptation for

migration during high river flows; however, virtually all captures of razorback suckers have been from essentially still water, particularly off channel ponds created from gravel excavation or for irrigation storage.

As is typical of species in the sucker family, the razorback sucker has fleshy lips that enable it to suck up small invertebrate animals and organic debris from the bottom. Also, numerous gillrakers make the razorback sucker well adapted for straining small animals (zooplankton) from the water passed over the gills for respiration. The food is sifted by the gillrakers and funneled into the throat, where it is finally ground by rows of pharyngeal teeth. The razorback sucker attains an old age (probably more than 20 years) and can reach a large size (more than 10 pounds). When formerly abundant, the razorback sucker and the squawfish were the most common and desirable food fish of the Colorado River basin, and supported local commercial fisheries.

Although the razorback sucker is well adapted to thrive in reservoirs, reproduction has not been sufficiently successful to maintain its numbers. When impoundments were created in the lower basin, razorback suckers soon established large populations; however, the populations declined as the fish became fewer and older each succeeding year. Razorback suckers have been observed spawning along the shores

in the lower basin reservoirs, but no young fish have been found. With a long evolutionary background in a river environment, young razorback suckers might lack the instincts necessary to avoid predation in a lake environment. Reservoirs have predatory species in abundance. Schools of feeding carp have been observed in the lower basin reservoirs over areas where the razorback sucker had spawned.

Most observations of spawning have been in reservoirs. Spawning is reported to occur at temperatures of 54° F to 68° F, in water 1 to 20 feet deep. In river environments, groups of spawning razorback suckers have been observed on gravel bars in the Colorado and lower Yampa rivers when the water temperature reached about 62° F. Ripe and spent fish found in off-channel ponds suggests that spawning also occurs in such habitats. Along the Colorado River in Colorado, razorback suckers are most frequently found in ponds, created by gravel excavation, adjacent to and connected with the river.

Past and Present Distribution

The original range of the razorback sucker was approximately that of the squawfish and bonytail chub, in the large-river environments from Mexico to Wyoming. Historically, it was more common in the lower than in the upper Colorado River basin. In the lower basin large populations built up in the reservoirs during the early years of impoundment, but they gradually declined and now mainly consist of old, large fish.

In the upper basin, razorback suckers disappeared from the Green River above the mouth of the Yampa River after the completion of Flaming Gorge Dam and the release of cold water. Some razorback suckers persist in the Green River below its confluence with the Yampa River, and are occasionally found in the lowermost reaches of the Yampa. In the Colorado River in Colorado, razorback suckers occur upstream to De Beque, about 30 miles above Grand Junction. In 1977 an estimated 250 razorback suckers were found stranded when a small irrigation reservoir, connected to the San Juan River near Bluff, Utah, was drawn down.

Causes of Decline

For the razorback sucker, like the other species discussed, dams and impoundments can be pointed to as the major cause of decline. Land-use and water-use practices, changing flow regimes, and river channel characteristics that eliminated the lagoon or

backwater type habitat can also be blamed. This seems evident from the intensive use of artificially created, off-channel pond habitat by razorback suckers. Non-native fishes such as carp, largemouth bass, and green sunfish also typically thrive in these pond areas, and they can effectively suppress successful reproduction of razorback suckers by predation on the eggs and young in such habitat.

In seeking clues bearing on the reasons for the decline of the razorback sucker, interpretation from an evolutionary perspective can be made. It is known that before environmental changes occurred and before non-native fishes became widely established in the Colorado River basin, two species of large suckers, the razorback and the flannelmouth, were both abundant. This means that the razorback sucker and flannelmouth sucker must have different niches. That is, the two species avoided direct competition with each other; because of differences in their life histories and ecologies, the food and space resources of their environment were divided in such a way that both maintained abundant populations.

The ecological distinctions between flannelmouth and razorback suckers can be interpreted from the differences in the way the two species are put together — the differences in body shape, lip structure, and gillrakers. These distinctions in body parts are a reflection of the different evolutionary pathways followed by the two species to make maximum use of a certain part of their environment and to avoid direct competition when populations of the two species occupy the same waters.

The flannelmouth sucker still maintains abundant populations under the present altered environmental regime, but the razorback sucker is rare. Obviously, then, the evolutionary specializations adopted by the razorback sucker to best use its historical niche have placed the species at a severe disadvantage in the modified environment of the Colorado River basin. What factors in the original environment characterized optimum habitat for razorback suckers? How have these factors been lost, impaired, or modified?

As the razorback sucker became rarer, the incidence of hybridization with flannelmouth suckers apparently increased. Almost half of the specimens captured, mainly in the Green River, from 1967 to 1973 were identified as hybrids. The proportion of hybrids taken from the Colorado River in recent years

varies from site to site. Some populations seem to be pure, but others contain a high percentage of hybrids.

Prospects for the Future

Because of its more widespread distribution and greater abundance, and its utilization of artificially created habitat, the razorback sucker seems to have a more hopeful future than do the three species previously discussed. The problem of successful reproduction must be solved before the continued existence can be assured and increased abundance can be effected. Adult razorback suckers flourish in reservoirs and pond type environments, but the young have not been found in such environments. It would be most important to know what the optimum spawning conditions are, in regard to depth, velocity, and substrate. It will also be important to learn what associated non-native fishes are least harmful and what species are most harmful to successful reproduction.

1982 UPDATE

Studies by California Fish and Game Department biologists in Senator Wash Reservoir, California, and by biologists of the University of Nevada's Lake Mead Laboratory in Lake Mohave, have provided some documentation on the spawning of razorback suckers and the role of non-native fish predation as a limiting factor for successful reproduction.

Razorback suckers were observed to spawn over rocky-gravel bottoms along lake shores. The spawning attracted many non-native fishes such as bass, sunfish, carp, and channel catfish which rapidly consumed the newly spawned eggs. In Senator Wash Reservoir, predation evidently was completely effective in suppressing reproductive success -- no young razorback suckers have yet been found. In Lake Mohave, some eggs do escape predation and a few newly hatched fish have been found. More intensive sampling of Lake Mohave has revealed the abundance of razorback suckers is much greater than previously thought and the wide range of sizes represented in collections indicate that past reproduction has been successful, at least in some years.

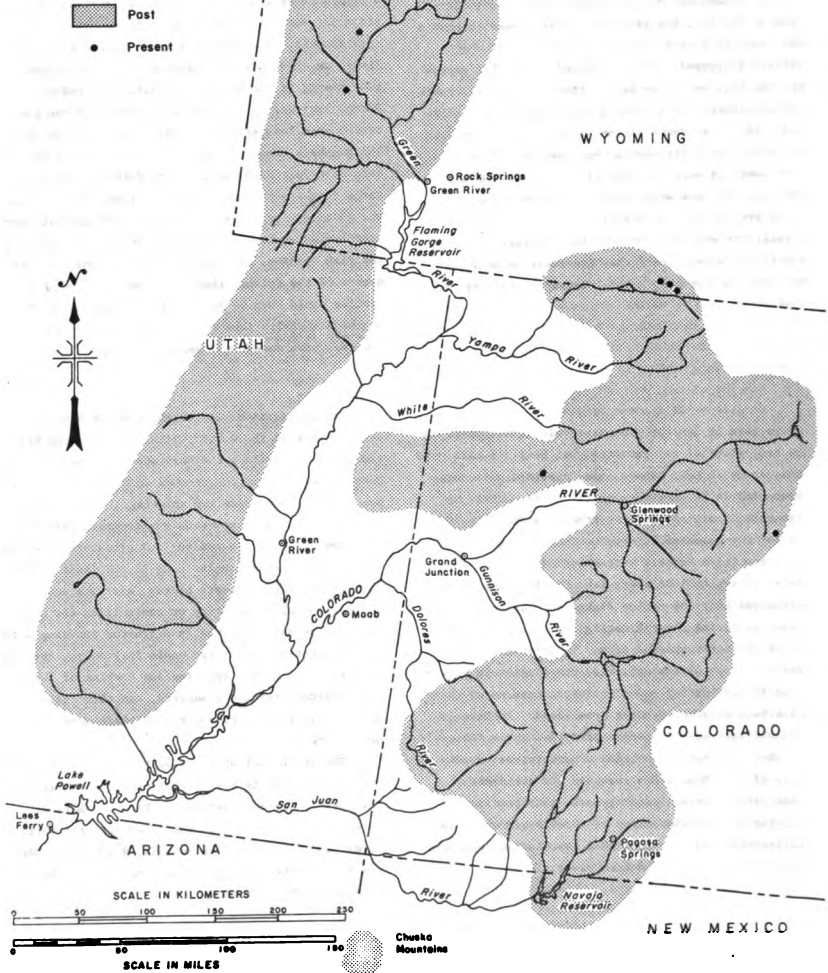
Artificial propagation of razorback suckers has been conducted for several years at the Willow Beach Federal Hatchery, Arizona. Populations could be maintained in reservoirs by stocking fish reared in a hatchery, but if reproduction is not successful in a reservoir or a section of a river, reproduction by stocked razorback suckers cannot be expected.

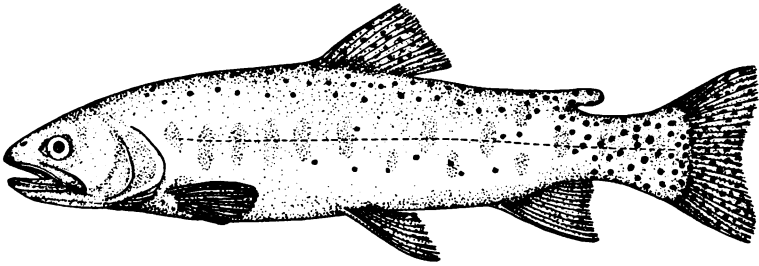
Because the razorback sucker has not yet been listed as endangered or threatened by the federal government, it has not been eligible for federally funded projects on endangered species, and has received much less attention than have the squawfish and humpback chub. It would be useful, for a better understanding of the species, to document its occurrence in all off-channel pond habitats, correlating the abundance of razorback suckers with habitat characteristics such as size, shape, depths, and associated fish species. An analysis of the common denominators of the factors that favor the success of the species could then be made. If this were done, future man-made modifications might be designed to benefit the razorback sucker and perhaps the squawfish.

The aggregations of razorback suckers noted every spring in the Walter Walker pond and the Clifton gravel pond along the Colorado River near Grand Junction can now be interpreted as fish seeking these pond type environments for spawning. The problem is, however, that these man-made environments also harbor the same array of non-native fish predators observed consuming razorback sucker eggs in the lower basin reservoirs. The recovery of the razorback sucker will depend on eliminating or controlling the numbers of non-native fishes in preferred spawning sites or constructing sites that would fill during the runoff period, allowing spawning and rearing of the newly hatched razorback suckers, and then drain during low flow to prevent the establishment of non-native fishes.

The artificial propagation program for the razorback sucker is now carried out at the Dexter, New Mexico, National Hatchery. Large numbers of hatchery-produced fish were stocked into the Salt, Verde, and Gila rivers of Arizona in 1981 and 1982, and future introductions are planned for the San Juan River of New Mexico.

DISTRIBUTION OF COLORADO RIVER CUTTHROAT TROUT





Colorado River Cutthroat Trout
Salmo clarki pleuriticus

Status

Threatened on Colorado state list. Rare throughout its original range.

Distinguishing Features

The cutthroat trout that is native to the upper Colorado River basin can be distinguished from non-native trout by its red or orange slash marks beneath the lower jaw and by the spotting pattern. Relatively large spots, rounded in outline and typically concentrated on the posterior part of the body, characterize the native cutthroat trout. The native trout has the hereditary basis to develop brilliant coloration, but the color pigments must be derived from its food. Thus, a native trout living in a lake with crustaceans (water fleas, "shrimps," etc.) expresses bright red, orange, and golden-yellow coloration when sexually mature, but the same fish living in a small stream with only insects in its diet is more dully colored.

The cutthroat trout species is made up of about 15 subspecies or geographical races distributed widely throughout the western United States and western Canada. The Colorado River cutthroat is a geographical race that has been isolated in the upper Colorado River basin. It is closely related to the greenback cutthroat trout native to the headwaters of the South Platte and Arkansas River basins, and to the Rio Grande cutthroat trout. There are no consistent differences that can separate all Colorado River

cutthroat trout from all greenback cutthroat trout except for geographical distribution -- one is native to the Colorado River basin, the other to the South Platte and Arkansas basins.

Hybrid populations between the native trout, rainbow trout and non-native subspecies of cutthroat trout are much more common than are pure populations of native trout.

Life History

There are no obvious ecological differences between the Colorado River cutthroat trout and other trout species in feeding, spawning, optimum habitat, etc. In tolerance of environmental disturbance, the cutthroat trout is like the canary in the mine -- it is usually the first species to go.

Spawning occurs in the spring, when water temperatures reach about 45° F. The female digs out a nest in gravel in flowing water. After fertilization, the eggs are covered with gravel and left to hatch later in the summer. Like most trout species, the cutthroat is opportunistic in its feeding. A wide range of invertebrate animals are eaten and the larger cutthroat trout prey on fish if they are available. The largest size attained by this subspecies is not known but probably was about 15 pounds. In small streams, however, few cutthroat trout exceed a length of 10 inches.

Past and Present Distribution

A hundred years ago the cutthroat trout inhabited all of the colder waters of the upper basin, from the headwaters of the Green and Colorado rivers to the San Juan River system on the east and the Dirty Devil River drainage on the west. The Green River below the town of Green River, Wyoming, and the Colorado River below Glenwood Springs, Colorado, were too warm in the summer for cutthroat trout. The main distribution was in the colder tributary systems at the higher elevations. The distribution of cutthroat trout began above a point where the distribution of the warmwater species such as the squawfish left off.

The early settlers found the native cutthroat trout in great numbers in all of the suitable trout waters of the basin. After the introduction of non-native trouts, the native cutthroat rapidly declined. Now only a few pure populations are found in small, isolated headwaters in Wyoming and Colorado.

In Trappers Lake, Colorado, a native cutthroat trout population still occurs. The Trappers Lake cutthroat has been exposed to hybridization from the Yellowstone Lake subspecies of cutthroat trout and from rainbow trout, and thus cannot be strictly regarded as constituting a "pure" population; however, the effect of past hybridization is not evident. The present Trappers Lake cutthroat trout are typical of the native subspecies, and are correctly classified as the Colorado River cutthroat trout. Trappers Lake cutthroat are propagated and stocked each year into high-elevation lakes in the northwest region of Colorado; thus, besides those caught in Trappers Lake itself, fishermen have the opportunity to catch the native trout from numerous lakes because of the stocking program. Most of the cutthroat trout now occurring in the Rocky Mountain region, are in high-elevation lakes. Consequently, many fishermen assume that this is their native habitat. However, almost all of the high mountain lakes in Colorado are isolated by formidable waterfalls, and no fish occurred in them naturally. Most of these lakes lack suitable tributary spawning streams, and the cutthroat trout populations are maintained by regular stocking.

Causes of Decline

Virtually all of the subspecies of cutthroat trout native to the interior regions of western North America have suffered the same fate as the Colorado River cutthroat trout. A hundred years ago, the cutthroat trout was the only trout that occurred in all of the famous Colorado trout streams, such as the

Gunnison, Roaring Fork, Arkansas, South Platte, the upper Yampa, and the upper Colorado rivers. After stocking of non-native fishes, the cutthroat trout was replaced by brown trout and rainbow trout in the larger streams and by brook trout in the higher elevation small streams. Hybridization between native cutthroat trout and non-native rainbow trout occurred on a massive scale in all waters where rainbows became established. Unlike most hybrids between animal species, the hybrid of cutthroat and rainbow trout is fertile and can reproduce. Thus, once hybridization was started it rapidly spread. Non-native subspecies of cutthroat trout, mainly from Yellowstone Lake, Wyoming, were stocked into Colorado waters by the millions to hybridize with the native cutthroat trout. Early fish cultural practices commonly mixed native and non-native trout indiscriminately. The introduction of non-native trouts was the major cause of the virtual elimination of pure populations of Colorado River cutthroat trout.

Prospects for the Future

Fortunately the highly generalized ecology of the native cutthroat trout allows the species to flourish in a variety of habitats, including very small headwater streams. Thus, a restoration program for native trout is far simpler than one for the previously discussed species. If all non-native trout can be eliminated from a lake or an isolated stream section by chemical treatment, native cutthroat trout from a known pure population can be transplanted and a new population established. This method of restoration has been used to establish several new populations of the greenback cutthroat trout in the South Platte River basin.

The cutthroat trout is more easily caught by fishermen than other trout species. Consequently it is the only trout that consistently responds to restrictive fishing regulations by increasing its numbers. Regulations designed to recycle all or most of the catch by requiring the release of all fish, or all fish within certain size limits, have worked well with cutthroat trout. The use of special regulations allowing the catching of native cutthroat trout, but restricting the kill, will probably become an important part of the management of the several subspecies of cutthroat trout native to the Rocky Mountain region.

1982 UPDATE

The Grand Junction office of the Colorado Division of Wildlife initiated an ambitious program in 1980 to determine the status of the native cutthroat trout. Many remote headwater streams and lakes were surveyed in 1980, 1981, and 1982, in an attempt to find populations of S. c. pleuriticus. Although most of the effort found only brook trout or hybrid populations, 12 new populations of pure or virtually pure S. c. pleuriticus were located. These newly

discovered populations, however, are limited to localized sections of small headwater streams.

The Colorado River cutthroat trout has been stocked into Timber Lake, Rocky Mountain National Park to re-establish the native trout to the Colorado River drainage of the Park. Successful reproduction was noted in 1982.

THE ENDANGERED SPECIES ACT

In the 1960's the environmental movement gathered momentum from increasing concern over accelerated extinction rates of life on earth. The U.S. Fish and Wildlife Service created an Office of Endangered Species and prepared the first list of endangered species in 1964. The Colorado River squawfish and the humpback chub were included on the first list. Congress passed an endangered species preservation act in 1966, as an expression of concern and awareness, but it lacked enforcement provisions to protect endangered species where conflicts might arise. In December 1973, Congress passed new endangered species legislation, P.L. 93-205, known as the Endangered Species Act of 1973. The 1973 Act contains strong provisions to protect species on the list when they or their environment are in conflict with any federal action or project which might have negative impacts. These provisions are detailed in Section 7 of the Act, which states that all federal agencies are to use their authority in furtherance of the Act by carrying out conservation programs for endangered and threatened species. Federal agencies are directed to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of endangered and threatened species or result in the destruction or modification of these species habitat that is determined to be critical by the Secretary of Interior after consultation with the affected States."

It was violation of Section 7 of the Endangered Species Act that caused the conflict between the snail darter and Tellico Dam in Tennessee. This project was deemed to jeopardize the continued existence of the snail darter, an endangered species, because the dam would modify the snail darter's critical habitat.

For a clearer understanding of the ramifications of Section 7 of the Endangered Species Act, two aspects must be differentiated -- that of private vs. federal jurisdiction and that of the endangered species and its critical habitat. Section 7 of the Endangered Species Act does not apply to private actions unless a federal agency or federal funding is involved. If a dam for electrical power generation is to be constructed with private funds on private property, permits from the Corps of Engineers and licensing by the Federal Energy Regulatory Commission must be obtained for the work; the private project then becomes subject to the provisions of Section 7 of the Endangered Species Act. Irrigation projects of the Water and Power Resources Service and land modifications funded by the Soil

Conservation Service are also subjected to the provisions of Section 7.

There has been considerable confusion over the term "critical habitat." The legal ramifications of critical habitat apply only to the endangered and threatened species that have had critical habitat designated by the Secretary of Interior. In an attempt to allay fears and to more clearly explain the meaning of "critical habitat," Keith M. Schreiner, former Associate Director of the Fish and Wildlife Service, published the following statement in the August 1976 issue of the Endangered Species Technical Bulletin (published by the Office of Endangered Species):

The most important point I can make about critical habitat is that in no way does it place an iron curtain around a particular area; that is, it does not create a wilderness area, inviolable sanctuary, or sealed-off refuge. Furthermore, I would stress that it does not give the Fish and Wildlife Service or any other government agency an easement on private property nor will it affect the ultimate jurisdiction regarding any public lands.

Critical habitat is provided for by Section 7 of the Endangered Species Act of 1973, which charges Federal agencies -- and only Federal agencies -- with the responsibility for ensuring actions authorized, funded, or carried out by them do not either 1) jeopardize the continued existence of Endangered or Threatened Species or 2) result in destruction of adverse modification of the habitats of these species. (State and private actions that do not involve Federal money or approval do not come under the terms of the Act.)

Simply stated, critical habitat is the area of land, water, and airspace required for the normal needs and survival of a species. As published in the Federal Register on April 22, 1975, the Service has defined these needs as space for growth, movements, and behavior; food and water; sites for breeding and rearing of offspring; cover or shelter; and other biological or physical requirements.

Mr. Schreiner added that each situation is unique and must be decided on a case-by-case basis. He emphasized the great amount of effort and expertise that

forms the basis of a biological opinion for a project impact where a potential conflict with the Endangered Species Act occurs.

Amendments were made to the Endangered Species Act in 1978. One calls for an economic analysis to be prepared before any critical habitat is designated. This amendment is designed to reveal negative economic impacts from the designation of critical habitat that might retard or block future development. Critical habitat had been proposed for the squawfish, but was withdrawn until an economic analysis can be prepared. Thus, the squawfish and humpback chub are endangered species, but neither has "critical habitat" in the legal sense of the term. Any future development project or environmental modification in the upper Colorado River basin, to be compatible with the Endangered Species Act, would be subjected to the provision that its construction and operation do not "jeopardize the continued existence" of the squawfish or humpback chub, but would not be subjected to the critical habitat provision until such critical habitat is defined and designated by the Secretary of Interior. Another 1978 amendment stipulates that, in the future, any species proposed for the federal list of endangered or threatened species must, "to the maximum extent prudent", have the critical habitat designated at the time it is listed.

The effects of the listing of a species as endangered or threatened by the Colorado Wildlife Commission consist mainly of the recognition of the plight of a species and the ordering of priorities for funding, study and restoration. No provisions in the state law are likely to conflict with the activities of state or federal agencies or private individuals, except that endangered species cannot be killed, transported, or sold. The three subspecies of native cutthroat trout in Colorado (Colorado River, greenback, and Rio Grande cutthroat trout) are all listed as threatened by the state, but they are covered by game fish regulations. It is not illegal to fish for, catch, and eat the native cutthroat trout except in waters where all angling has been prohibited, such as those in Rocky Mountain National Park where greenback cutthroat trout occur. Some streams have been set aside for catch-and-release angling for the Rio Grande cutthroat trout, and more of these special regulation trout fisheries are likely to be established as part of restoration programs.

The federal Endangered Species Act defines an endangered species as one that is in danger of

extinction throughout all or a significant portion of its range. A "species" is defined to include subspecies and smaller units of a species. Thus, the Kendall Warm Springs dace and several subspecies of cutthroat trout, including the greenback cutthroat in Colorado, have been listed as endangered or threatened species on the federal list, even though the species as a whole was not endangered. A "threatened species" is defined as any species that is likely to become an endangered species in the foreseeable future. Insofar as the Endangered Species Act is concerned, there is little difference in the legal protection given endangered and threatened species. A threatened species, however, may be the object of a properly regulated sport fishery.

When a potential conflict arises with the occurrence of an endangered species in an area where a federal project or action is deemed to pose a threat to the species, a consultation process with the U.S. Fish and Wildlife Service is initiated. The consultation process is an attempt to find ways that would allow the planning, construction, and operation of a proposed project to be compatible with the Endangered Species Act.

Fair and equitable administration of the Endangered Species Act to protect a species and at the same time allow new development projects to proceed is not a simple matter. It is generally realized that an uncompromising, ultraprotectionist stance should not be taken with endangered species to block future economic development. Such action would create a backlash in public opinion concerning the need to preserve endangered species. The official view of the U.S. Fish and Wildlife Service was presented by the former Associate Director, K. M. Shreiner, to the 1977 annual meeting of Western State Game and Fish Commissioners:

We must stop our traditional adversary role in water development, power development, agricultural expansion, energy production, etc., and start trying to help the developers locate the site, design the structure and develop the operational regime that will do the least harm to wild plant and animal species and their habitats. It is likely that we can enhance the habitat and ultimately the species if we accept the fact that development must and will continue.

So I repeat, realistic endangered species administration means all of us helping developers to locate, design and operate their projects in a manner that is least harmful to species and their habitats.

Almost all conflicts between development and endangered species have been resolved to date by the consultation process. In a situation where a conflict cannot be resolved (as in the case of Tellico Dam and the snail darter), a 1978 amendment to the Endangered Species Act provides for an exemption process. A Review Board consisting of persons appointed by the Secretary of Interior and by the President, with a third member represented by a judge appointed by the Civil Service Commission, decides if an irresolvable conflict exists. If the Review Board decides that an irresolvable conflict exists, the exemption application is considered by a seven-member Endangered Species Committee made up of the Secretary of Agriculture, the Secretary of Army, the Secretary of Interior, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Administrator of the National Oceanic and Atmospheric Administration, and a person appointed by the President after consultation with the Governor of the state concerned. An exemption to the Endangered Species Act can be granted if five of the seven members of the Committee agree to exempt the project. In their judgment, the Committee considers if there are reasonable alternatives to the project or if the benefits of exemption clearly outweigh the values of endangered species protection,

and determines the overall significance of the project to the region and to the nation. The final decision is subject to a review by the U.S. Court of Appeals. Any person is entitled to bring action to obtain this judicial review. If the Committee votes against exemption and the decision is upheld by the court, only special legislation passed by Congress can create an exemption.

There is no doubt that there are many situations of potential conflict in the upper Colorado River basin in relation to future water and energy projects as they may modify the environment and impact the squawfish and the humpback chub. Although each project must be examined individually, a holistic view of the future is necessary to predict combined effects if all projects planned were allowed to proceed. The ultimate objectives are to guide and direct future environmental modifications so that changes in flow regime, temperature, and water quality will have a beneficial impact on the endangered species. The present research efforts of the U.S. Fish and Wildlife Service and the Colorado Division of Wildlife on the life history, ecology, and habitat preference of the squawfish and humpback chub are designed to provide the basis for resolving conflicts between the endangered species and future development in the basin.

There are likely to be delays, compromises, and increased costs associated with some new projects in the upper Colorado River basin. If conflict with the Endangered Species Act is to be avoided, any future environmental modification should not be harmful and, preferably, of course, it should be designed to be beneficial to endangered species.

1982 UPDATE

On October 13, 1982, President Reagan signed the Endangered Species Act Amendments of 1982 reauthorizing and further amending the Endangered Species Act of 1973. In addition to specifying shorter time periods for the listing and exemption processes, several significant changes were made. Critical habitat designation and economic evaluation are no longer required prior to the listing of a species. Biological criteria determining a species status are now the only considerations for the listing of species as endangered or threatened.

The U.S. Fish and Wildlife Service must now act on a petition to list or delist a species, "to the maximum extent practical", within 90 days and to

publish their findings on the scientific merit of the petition. Final action on listing, delisting or critical habitat proposals must now be accomplished within one year instead of the two years previously allowed.

A new amendment creates a category of "experimental population" for a population of an endangered or threatened species introduced outside of its present range. If the "experimental population" is determined to be not essential for the continued existence of the species then it will be protected in the same manner as species proposed for endangered or threatened status and will not receive the full protection of the Act unless it occurs in a National Park

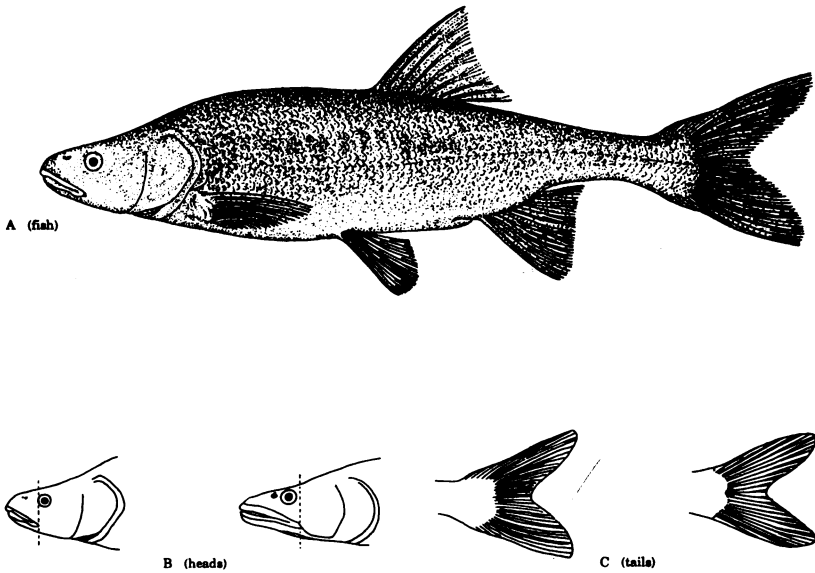
or National Wildlife Refuge. This amendment should facilitate the introduction of endangered species such as squawfish, humpback and bonytail chubs into parts of their original range where they no longer exist because the introduced "experimental populations" would not be listed as endangered. Vigorous objection to the introduction of endangered species

into areas where they do not now exist has effectively limited all stocking of squawfish and humpback chub to areas where they presently occur. The stocking of the razorback sucker into three rivers in Arizona was possible only because this species is not a federally listed species.

REFERENCES

- Comprehensive bibliographies on the upper Colorado River basin were compiled by Wydoski et al. (1980) and by Joseph et al. (1977). Most of the pertinent literature pertaining to the current status of the rare native fishes of the upper Colorado River basin is in the form of theses and agency reports that are not generally available in libraries. The following list of references includes those that have appeared since the above-mentioned bibliographies were completed, and some of the significant older publications that are in journals or serials available in the larger academic libraries.
- Behnke, R. J., and M. Zarn. 1976. Biology and management of threatened and endangered western trouts. U.S. Forest Service, Rocky Mtn. For., Eng. Exp. Sta., Gen. Tech. Rep. RM-28:45p.
- Carlson, C. A., W. H. Miller, and H. M. Tyus (eds.). 1982 (in press). Fishes of the upper Colorado River system: Present and future. Proceedings of symposium at Am. Fish. Soc. Annual Meeting, Sept. 18, 1981, Albuquerque, N.M.
- Carlson, C. A., C. G. Prewitt, D. E. Snyder, and E. J. Wick. 1979. Fishes and macroinvertebrates of the White and Yampa Rivers, Colorado. Final Report Baseline Survey for U.S. Bureau Land Management, Denver, Co.:276p.
- Deacon, J. E., G. Kobetich, J. D. Williams, and S. Contreras. 1979. Fishes of North America endangered, threatened, or of special concern:1979. Fisheries (Bull. Am. Fish. Soc.) 4(2):29-44.
- Ehrenfeld, D. W. 1976. The conservation of non-resources. Am. Sci. 64:648-656.
- Evermann, B. W., and C. Rutter. 1895. Fishes of the Colorado basin. U.S. Fish Comm. Bull. 14:473-486.
- Fradkin, P. L. 1981. A River No More, the Colorado River and the West. Alfred A. Knopf, New York: 360p.
- Hammann, R. L. 1981A. Spawning and culture of Colorado squawfish in raceways. Progressive Fish-Culturist, 43(4):173-177.
- Hammann, R. L. 1981B. Hybridization of three species of chub in a hatchery. Ibid. 43(3):140-141.
- Haynes, C. M., T. A. Lytle, E. J. Wick, and R. T. Muth. 1982 (in press). Larval Colorado squawfish (*Ptychocheilus lucius*) in the upper Colorado River basin, Colorado, 1979-81. S.W. Nat.
- Holden, P. B. 1979. Ecology of riverine fishes in regulated stream systems with emphasis on the Colorado River. In J. V. Ward and J. A. Stanford, eds. The ecology of regulated streams. Plenum Publishing Corp., N.Y., N.Y.
- Holden, P. B., and L. W. Crist. 1979. Documentation of changes in the macroinvertebrate and fish populations in the Green River due to inlet modification of Flaming Gorge Dam. U.S. Fish and Wildlife Ser., Biol. Ser. Program, Fort Collins, Col., FR-16-2:112p.
- Holden, P. B., and D. A. Selby. 1978. A study to determine spawning requirements of Colorado squawfish. Ibid. FR-17-1:29p.
- Holden, P. B., and C. B. Stalnaker. 1975a. Distribution and abundance of mainstream fishes of the middle and upper Colorado River basin, 1967-1973. Trans. Am. Fish. Soc. 104(2):217-231.
- Holden, P. B., and C. B. Stalnaker. 1975b. Distribution of fishes in the Dolores and Yampa river systems of the upper Colorado basin. Southwest. Nat. 19(4):403-412.
- Johnson, J. E. and J. W. Rinne. 1982. The Endangered Species Act and Southwest Fisheries. Fisheries (bulletin of Amer. Fish. Soc.) 7(4):2-8.
- Jordan, D. S. 1891. Report of explorations in Colorado and Utah during the summer of 1889, with an account of the fishes found in each of the river basins examined. U.S. Fish Comm. Bull. 9:1-40.
- Joseph, T. W., J. A. Sinning, R. J. Behnke, and P. B. Holden. 1977. An indexed annotated bibliography of the endangered and threatened fishes of the upper Colorado River system. U.S. Fish and Wildlife Ser., Office of Biol. Ser., Fort Collins, CO., FWS/OBS Rep. 24, part 1:168p.
- Joseph, T. W., J. A. Sinning, R. J. Behnke, and P. B. Holden. 1977. An evaluation of the status, life history, and habitat requirements of endangered and threatened fishes of the upper Colorado River system. Ibid., part 2:183p.
- Langan, S. H., C. R. Berry, and D. Robinson. 1979. Distribution and abundance of fishes in the White River, Utah. U.S. Bur. Land Mgt., Utah St. Office, interim rep.:72p.
- Lytle, T. and E. J. Wagner. 1981. Colorado River cutthroat trout inventory. Colo. Div. Wildlife, Endangered Wildlife Investigations Performance Rep. SE-3-3:45p.

- McAda, C. W., and R. S. Wydoski. 1980. The razor-back sucker, *Xyrauchen texanus*, in the upper Colorado River basin. U.S. Fish Wildl. Serv., Tech. Pap. 99:15p.
- McAda, C. W., C. R. Berry, and R. S. Wydoski. 1977. A survey of endangered, threatened, and unique fish in southeastern Utah streams within the coal planning area. Pages 1-265 in T. C. Bonner, W. A. Heggen, C. McAda, C. Phillips, C. R. Berry, and R. S. Wydoski. A survey of endangered, threatened, and unique terrestrial and aquatic wildlife in Utah's coal planning area. Utah Dept. Nat. Res., Div. Wildlife, Salt Lake City.
- Miller, R. R. 1961. Man and the changing fish fauna of the American Southwest. Mich. Acad. Sci. Arts Lett. 46:365-404.
- Miller, R. R. 1963. Is our native underwater life worth saving? Natl. Parks Mag. 37(188):4-9.
- Minkley, W. L., and J. E. Deacon. 1968. Southwest fishes and the enigma of "endangered species". Science 159 (3822):1424-1432.
- Myers, N. 1977. Garden of Eden to weed patch: the earth's vanishing genetic heritage. Nat. Resour. Defense Council. Newsl. 6(1):1-15.
- Pister, E. P. 1976. A rationale for the management of nongame fish and wildlife. Fisheries (Bull. Am. Fish. Soc.) 1(1):11-14.
- Seethaler, K. 1978. Life history and ecology of the Colorado squawfish (*Ptychocheilus lucius*) in the upper Colorado River basin. M.S. Thesis, Utah St. Univ., Logan, Utah:153p.
- Snyder, D. E. 1981. Contribution to a guide to the cypriniform fish larvae of the upper Colorado River system in Colorado. USDI Bureau of Land Mgt. Bio. Sci. Ser. No. 3, Denver, CO:81p.
- Spofford, W. O., A. L. Parker, and A. V. Kneese (eds.). 1980. Energy development in the Southwest, problems of water, fish and wildlife in the upper Colorado River basin. Resources for the future, Res. Pap. R-18 (two volumes).
- Stanford, J. A., and J. V. Ward. 1983 (in press). The Colorado: North America's desert river in B. R. Davies and K. F. Walker (eds.). Ecology of river systems. Monogr. Biologicae. Dr. W. Junk, the Hague.
- Suttkus, R. D., and G. H. Clemmer. 1977. The hump-back chub, *Gila cypha*, in the Grand Canyon area of the Colorado River. Occas. Pap. Tulane Univ. Mus. Nat. Hist. 1:30p.
- U.S. Dept. Int. Fish and Wildl. Service, various authors. 1982. Final reports of Colorado River Fisheries Project to Bur. Rec. The results of investigations 1979-1981 are presented as follows: Part 1, summary report; part 2, field studies.
- Vanicek, C. D., and R. H. Kramer. 1969. Life history of the Colorado squawfish, *Ptychocheilus lucius*, and the Colorado chub, *Gila robusta*, in the Green River in Dinosaur National Monument, 1964-1966. Trans. Am. Fish. Soc. 98(2):193-208.
- Vanicek, C. D., R. H. Kramer, and D. R. Franklin. 1970. Distribution of Green River fishes in Utah and Colorado following closure of Flaming Gorge Dam. Southwest Nat. 14(3):297-315.
- Wick, E. J., T. A. Lytle, and C. M. Haynes. 1981. Colorado Squawfish and humpback chub population and habitat monitoring. Colorado Division of Wildlife, Denver. Federal Aid Endangered Wildlife Program Report SE-3-3:156p.
- Williams, J. D., and D. K. Finnley. 1977. Our vanishing fishes, can they be saved? Frontiers, Summer, 1977:12p.
- Wiltsius, W. J. 1978. Some factors historically affecting the distribution and abundance of fishes in the Gunnison River. Final Rep. to U.S. Bur. Recl. Fish Invest. Lower Gunnison R. drainage:215p.
- Wydoski, R. S., K. Gilbert, K. Seethaler, C. W. McAda, and J. A. Wydoski. 1980. Annotated bibliography for aquatic resource management of the upper Colorado River ecosystem. U.S. Fish Wildl. Serv. Resource Publ. 135:186p.



APPENDIX 1

Distinguishing characters of roundtail chub and squawfish.

- A. The roundtail chub, *Gila robusta*.
- B. Heads of roundtail chub (left) and squawfish (right) showing the length of the jaw in relation to the eye.
- C. Tails of roundtail chub (left) and young squawfish (right) showing the dark blotch on the base of tail in squawfish.

PREPARED STATEMENT OF HON. V.G. JOHNSON, C.B.E., J.P., CABINET MEMBER FOR
DEVELOPMENT AND NATURAL RESOURCES, GOVERNMENT OF THE CAYMAN ISLANDS

Mr. Chairman and Members of the Subcommittee; I appreciate this opportunity and the privilege to express our views to you on an issue involving the green sea turtles which I am sure is of mutual interest to both our governments. This species (*Chelonia mydas*) is listed as a threatened species pursuant to Section 4 of the Endangered Species Act of 1972. In the Cayman Islands, it is the subject of the world's only intensive effort to develop the captive breeding technology for this species. This effort, initiated nearly two decades ago by private interests, is now owned by the Cayman Islands Government and is known as the Cayman Turtle Farm (1983) Ltd. (CTF). It has been designed to be both scientifically valid and commercially self supporting. Its entire operation is subject to public scrutiny.

In 1979, after a long and arduous process, the United States refused to adopt a provision in its regulations on the green sea turtle which would have allowed the importation of farmed turtle products. This action destroyed the major market and transshipment point for CTF, threatening its viability and continuation. In 1982, your Department of the Interior was petitioned by the Pacific Legal Foundation to reconsider the matter. Your Subcommittee held hearings on the matter on October 4, 1982, and compiled an extensive record. At that hearing, the Assistant Secretary of the Interior announced a new policy on the turtle issue. He said that as long as inter-accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the United States would allow the importation of those products.

In January, 1983, the Department of the Interior issued a notice of intent to reconsider the green sea turtle rule. We wrote to the department requesting relief on our most immediate problem—the lack of transshipment capability through U.S. ports. As was developed at the October 1982 hearings, there was by no means unanimous opinion that CTF lacked legal grounds to be trading under CITES. Several countries, both parties to CITES and non-parties, accepted our shipments. However, the loss of important and reliable transshipment points such as Miami, because of the 1979 ruling, made it nearly impossible for CTF to fill orders from these countries. In May 1983, the Departments of Commerce and Interior published a proposed rule on this point.

The process dragged on for almost a year. During that time we began our preparations to get a more permanent and stable solution to this situation. We evaluated the options available under CITES and decided that although there was nothing which fit our situation precisely, the "ranching" concept offered the best route. The ambiguity arose because the "traditional" wildlife ranch involved a continual taking from a local wild population, with replacement of part of this offtake by the "head-starting" of juveniles. In the CTF situation, the only taking from the wild had stopped years ago, as the operation was designed to be completely self-sustaining once an initial stock had been acquired. In addition, there was no local population of green sea turtles, because they had been gone from Cayman waters in any numbers since the beginning of this century. Since CTF program supported an active conservation program carried out with the Cayman Islands Government, which included beach patrols, captive hatching and rearing of the occasional nest found on the beaches, and the release of large numbers of hatchlings and juveniles to Cayman waters, we felt that CTF was better, in conservation terms, than the "traditional" ranch.

We knew that the restrictive criteria adopted by the CITES parties in 1979 had been intended by many environmentalists to block CTF from trading. We also knew that the call for the development of a ranching concept, which was strongly supported by the United States, was intended as an antidote to that situation. In fact, at the 1981 CITES conference in New Delhi, at which the ranching criteria were adopted (Resolution Conf. 315), the United States pointed out that this concept was broad enough to include operations such as CTF.

With all this in mind, we prepared a detailed proposal for the downlisting of the Cayman Island captive population of green sea turtles on the basis of ranching. In March of 1984, due to changes in European Community Regulations which made the proposed U.S. Transshipment Regulations no longer of value to us.

On June 5, 1984, we presented such a petition to your Department of Commerce and Interior. Simultaneously, we submitted our ranching proposal to the CITES Secretariat. As of this time, no proposed rule has been issued by your Government, although we are told that one is imminent.

At a preparatory CITES meeting in Brussels in June, 1984, we were "thrown a curve", an American term, by none other than the CITES Secretariat. The Secretar-

iat raised the point that our ranching proposal was "inappropriate", since we did not take from a local population. We understood, as I explained above, that there is some ambiguity in our situation, but we thought we had erred on the conservative side. We were disappointed by the Secretariat's adverse views and strong insistence on this point. The U.S. delegation put it properly when they observed that this was a case of bureaucracy out of line, in that form was being looked at over substance.

We were even more concerned when we reviewed the official Secretariat comments on our proposal, which were released quite recently. The Secretariat actually recommended rejection of our proposal because we do not take turtles from a non-existent local population. The Secretariat did this at the same time as saying, "... the Secretariat wishes to re-emphasize its strong support for a positive solution to the problem of the Cayman Turtle Farm..." The Secretariat requested the United Kingdom to submit an alternative proposal to solve the CTF problem. We obliged with a draft resolution construing that the captive-bred criteria which had been adopted by the Parties in 1979 should not be applied retrospectively to the activities of CTF.

We recently saw a comment from an international consortium of "environmental" groups that said that the alternative proposal referred to above had been submitted "in the event that this proposal (the ranching proposal) does not succeed..." Not only is this false, but it ignores the fact that the alternate proposal was submitted at the Secretariat's request. Of course, the consortium's continuing position is to oppose the ranching proposal and the alternative proposal, and perhaps any other proposal put forward by CTF.

We have made extensive efforts to contact the Parties to CITES in order to share with them our views on this issue. Just as we did in the preparation of our ranching proposal and our petition for rulemaking, we have attempted to be open and candid, and let the parties make their judgment.

We expect stiff opposition at the CITES conference in Buenos Aires. As an example, we have seen a copy of a petition being circulated worldwide, requesting its signatories to voice their disapproval of the several green sea turtle proposals which are on the agenda. The petition is false and misleading, because it implies strongly that these proposals would allow wide-open trade from unprotected wild populations. There is no mention in the petition that the CTF operation does not take from the wild at all, neither is there any mention of ranching as a concept, or that these proposals (with one exception) are ranching proposals. The developers of this petition plan to present it in a dramatic gesture.

We appreciate the support given to us and our ranching proposal by the United States. We will continue to rely upon such support at the Buenos Aires Conference of the CITES Parties, which begins on April 22. Following that Conference, we hope that if our proposal succeeds we can look forward to speedy and positive action by your Government to lift its ban on the importation of green sea turtle products from CTF. Such action on your part would I can assure you render to our small territory and its small population an invaluable service for which we would all be most grateful.

Many thanks again for the opportunity of addressing you on the subject and of presenting an update of events as we see them.

PREPARED STATEMENT OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS

The National Ocean Industries Association (NOIA) and the International Association of Geophysical Contractors (IAGC) are pleased to submit this statement for the record on H.R. 1027, a bill the reauthorize the Endangered Species Act (ESA). NOIA is a national trade association with approximately 450 member companies that provide the services and equipment used in all phases of offshore oil and gas exploration and development. IAGC is an international trade association which represents virtually all of the geophysical exploration companies which do approximately 95% of the petroleum-finding geophysical exploration onshore and offshore the United States.

As you know, the Endangered Species Act (ESA) has been previously amended by the Congress and responds to a recognition that, under certain circumstances, natural resource exploration and use can be conducted in a manner that would not jeopardize the continuing existence of species protected under the ESA. The Act provides for conflicts between the ESA and federal actions to be resolved by a consultation process between the federal agency taking action which might affect a protected species and the Department of Commerce (DOC) and the Interior (DOI) as appro-

priate. This consultation would be with either the U.S. Fish and Wildlife Service (DOI) or the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration (DOC), depending on the species involved.

There have been numerous consultations and associated biological opinions developed in response to the Department of the Interior's Outer Continental Shelf leasing program. Many of these consultations and associated biological which can be taken by people obtaining permission to operate on the OCS that would result in no jeopardy to the species of concern. This revision of public policy provides for exploration and use of this nation's resources contained in the OCS for achievement of energy and mineral independence and security.

There has been, however, a double-bind situation for our industries because most of the biological opinions affecting the offshore industries have been about marine mammals protected under the Marine Mammal Protection Act (MMPA). Enclosed is a copy of 4 October 1983 letter to Mr. David C. Russell, then Acting Director of the Minerals Management Service (DOI), from Mr. William G. Gordon, Assistant Administrator for Fisheries (NOAA/DOC). Please refer to paragraph four of that letter which states that the biological opinion enclosed with the letter in no way permits the taking of endangered whales. This decision resulted from the fact that under Section 17 of the ESA, unless otherwise provided, no provisions of the ESA shall take precedence over any more restrictive provision of the MMPA. Under Section 101(a)(3)(B) of the MMPA, the "taking" of protected species of marine mammals can be permitted only for scientific purposes. Therefore, the biological opinion and reasonable and prudent measures offer one of numerous examples of this double-bind situation that has occurred throughout areas of the west coast of the United States and areas offshore Alaska which offer the greatest opportunity for future discoveries of energy and non-energy minerals for this nation.

Since public policy relative to species protected under the Endangered Species Act has been modified to allow for a balanced between the preservation and enhancement of a protected species while allowing for natural resource exploration and use activities which can be conducted in a manner that does not jeopardize the protected species, we believe that the same balance should be extended to situations involving marine mammals. Therefore, we offer for your consideration and inclusion in the process of approving reauthorization for appropriations for the Endangered Species Act the following technical and conforming amendment to Section 17 of the ESA:

"Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive provisions of the Marine Mammal Protection Act of 1972[.] *except with regard to takings authorized by Section 4(d), 7(b)(4) and 10(a)(1).*" [Italicized language is recommended amendment.]

This technical amendment would provide for the authority of consultative agencies, which subsequent to development of a biological opinion offer either a no-jeopardy opinion, or in the case of a jeopardy opinion, reasonable and prudent measures which will assure no jeopardy, to extend to marine mammals protected under the Marine Mammal Protected Act. This amendment would also allow federal agencies to take actions which would enhance the propagation or survival of protected marine mammal species. If this amendment is enacted, the ESA and MMPA will continue to offer protection of marine mammals when the appropriate federal agencies conclude that no reasonable or prudent measures are available to assure that the continued existence of an endangered species is not jeopardized.

Please contact Mr. Bill DuBose of the National Ocean Industries Association on 202/785-5116 or Mr. Charles Darden of the International Association of Drilling Contractors on 303/458-8404 or Mr. Larry Bowles of Geophysical Service Inc. (Chairman of the NOIA Environmental Conservation and Safety Committee and Chairman of the IAGC Public and Governmental Affairs Committee) on 214/995-7605 for additional information and any assistance that we could provide to assure the consideration of our recommended amendment.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
NATIONAL MARINE FISHERIES SERVICE,
Washington, DC, October 4, 1983.

Mr. DAVID C. RUSSELL,
Acting Director, Minerals Management Service, Department of the Interior, Washington, DC.

DEAR MR. RUSSELL: Enclosed are the Biological Opinion and Statement Regarding Incidental Taking prepared by the National Marine Fisheries Service pursuant to

Section 7 of the Endangered Species Act of 1973 (ESA), concerning the impacts of Outer Continental Shelf (OCS) oil and gas leasing and exploration activities associated with proposed Lease Sale 80 on endangered whales and threatened and endangered sea turtles.

Based on our review of the information on the proposed activities in the Sale 80 area and information on the biology and ecology of whales and sea turtles in the project area, we have determined that the proposed activity is not likely to jeopardize the continued existence of any of the species or populations considered in the Biological Opinion. We remain concerned about the cumulative effects of offshore mineral exploration and development on endangered and threatened species and recommend that the Minerals Management Service continue to monitor sea turtle and whale populations to determine better the effects of OCS related activities on these species.

New information on the timing, location, and nature of activities associated with OCS oil and gas leasing and exploration, and exploration plans and permit applications should be reviewed by the Department of the Interior on a case-by-case basis to determine if additional consultation pursuant to Section 7 is required.

The enclosed Biological Opinion in no way permits the taking of endangered whales. Such taking, unless properly permitted, is prohibited under Section 9 of the ESA and under Section 102 of the Marine Mammal Protection Act (MMPA). Section 17 of the ESA states that unless otherwise provided, no provision of the ESA shall take precedence over any more restrictive provisions of the MMPA. Under Section 101(a)(3)(B) of the MMPA taking of depleted species of marine mammals can be permitted only for scientific purposes. Therefore no statement concerning incidental taking of endangered whales pursuant to Section 7(b)(4) of the ESA is appended to our opinion.

No sea turtle mortality has been reported incidental to OCS activities off California, and we do not anticipate any. Therefore, we have not provided an estimate, pursuant to Section 7(b)(4), of an acceptable level of mortality. Our statement concerning incidental taking contains the following conditions: any mortality of sea turtles associated with activities conducted under this lease sale be reported to the Southwest Regional Office as soon as practical, and that your Pacific OCS Office staff cooperate with the Southwest Region staff in reviewing the circumstances to determine if measures need to be developed to prevent or mitigate additional mortality.

I look forward to continued cooperation during future consultations.

Sincerely yours,

WILLIAM G. GORDON,
Assistant Administrator for Fisheries.

PREPARED STATEMENT OF THE NATURAL RESOURCES DEFENSE COUNCIL, NATIVE PLANT SOCIETY OF OREGON, NEW ENGLAND WILD FLOWER SOCIETY, WAIMEA ARBORETUM AND BOTANICAL GARDEN, AND MRS. LAVERNE R. COLLARD, OPERATION WILDFLOWER CHAIRMAN, NATIONAL COUNCIL OF STATE GARDEN CLUBS

The Natural Resources Defense Council, Inc. (NRDC) is a public-interest environmental organization of 45,000 members. Since 1978, we have sought to improve programs, including the Endangered Species Act (ESA), that protect rare species of plants. The Native Plant Society of Oregon (NPSO) has over 600 members in 8 chapters around the state. NPSO is 25 years old. The New England Wild Flower Society (NEWFS) has over 3,000 members, primarily in New England. The NEWFS is over 50 years old. The Waimea Arboretum is a privately owned institution that provides a gene pool of wild plants for use by researchers. LaVerne Collard for many years has led efforts by the National Council of State Garden Clubs to promote landscaping with hardy native plants.

The Subcommittee on Fisheries, Wildlife Conservation and the Environment has been helpful in the past, adopting amendments to the ESA and Lacey Act that increased legal protection for our native flora. Unfortunately, our task is not yet finished. The ESA does not yet provide adequate protection for plant species.

Two of the weaknesses are generic to the Act: lack of adequate resources to carry out listing, recovery, and other components of the program; and failure to protect candidate species. Because of the large number of candidate plant species and historic and continuing delays in listing them, these issues affect rare plants disproportionately. These issues are discussed more fully by the Environmental Defense Fund in a statement to which we subscribe.

A third weakness of the Act uniquely affects plant species: whereas the Act broadly prohibits the "taking" of any endangered animal, only listed plants occurring on federal lands are protected from taking, and then only when the plant is "reduced to possession," i.e., collected for use in horticulture or as a pressed and dried specimen. That means vandals may cut, uproot or otherwise destroy endangered plants on federal lands without violating the Act. On private and other non-federal lands, the Act does nothing to prevent vandals, collectors, and others from destroying or collecting imperiled plant species.

The ESA does prohibit interstate and foreign commerce, import, and export of listed plant species without a permit. However, it is not clear whether the term, "interstate commerce" is sufficiently broad to outlaw one hobbyist sending a "gift" of a collected plant to another.

Mounting evidence shows that effective plant conservation requires more than the Act provides. Many listed or candidate plants have been seriously reduced through overcollecting.

In 1984, the extremely rare Virginia round-leaf birch, *Betula uber*, suffered a dramatic setback at the hands of mankind. This tree had only thirty seedlings at the beginning of last spring, all on private land. Eighteen of these shortly disappeared, apparently due to collecting or vandalism. Although this tree was thus reduced to a known population of only 11 mature or sapling trees and 12 seedlings, the malicious action was not a violation of the ESA or any other federal law. While the Virginia round-leaf birch is not a particularly attractive species, it is sought because of its rarity; at least one nursery is offering what are said to be propagated plants.

Sarracenia erophila, the green pitcher plant, was listed as endangered in 1979. It is one of the rarest carnivorous plants in the world and highly sought-after by the specialist collector. Since all populations are on non-federal land, it is legal to collect it as long as the plants are not sold or bartered. In 1981, several plants were taken from one bog in Alabama. In 1984, a man from Florida travelled to Alabama to collect plants, returned to Florida and mailed specimens of the wild-collected plants to several people in other states.

Because of poor enforcement of existing trade controls (of which, more below), we have difficulty documenting additional cases of listed plants having been collected. However, we have seen correspondence from cactus dealers offering to collect and sell listed cacti. Furthermore, we can cite other examples of collecting of proposed or candidate plant species under circumstances that would remain legal after the species' listing under the Act's current limited wording.

Pediocactus knowltonii.—This tiny cactus, one of the first to be listed as endangered, is a collectors' item because of its diminutive size and large flowers. Between 1965 and 1981, its population was reduced from about 5,000 to 1,500 by flooding by a dam and commercial collecting of many of the remaining plants. The landowner was unable to prevent people from entering his land for this purpose. FWS botanists content that only because collectors believe that the population is too depleted to reward a collecting trip have they not disturbed the area in recent years. The land has recently been acquired by the Nature Conservancy, but it remains vulnerable to collectors because it still remains without legal protection.

Two Florida cactus of the *Cereus* genus face threats from private collecting and vandalism with guns and machetes. *Cereus robinii*, the Key tree-cactus, is a listed endangered species found on the Florida Keys and in Cuba. The Florida population is on both private and public lands. About ten years ago, a nursery reduced populations of several *Cereus* species, including *C. robinii*, from one isolated grove on the key. *Cereus eriophorus* var. *fragrans*, the fragrant wooly cactus, is soon to be proposed as endangered. The population is limited to 40–50 plants on private lands adjacent to a state park. Authorities suspect that plants were collected only recently. This plant is also threatened by motorcycle use of the area.

Rhododendron chapmanii, the Chapman's rhododendron, is one of the loveliest of the native rhododendrons with brilliant pink blossoms. Listed as endangered, it is native to the pinelands of Florida. Before the listing, one of only four known populations was totally eliminated when its location was discovered by collectors. The fact that propagated plants are offered for sale is evidence of a continuing interest in this species.

Even the less beautiful or conspicuous species are subject to collecting. *Acanthomintha obovata* ssp. *duttonii*, the San Mateo thornmint, is a small herb with a remaining population of only 2,000 to 3,000 plants located in a county park. In 1983, several large chunks of turf, including soil, were removed by one or more collectors.

NRDC, NPSO, NEWFS, Waimea Arboretum and Mrs. Collard ask the Subcommittee on Fisheries, Wildlife Conservation and the Environment to correct many of the deficiencies in the Act by adopting the following amendments:

(1) Amend Section 9(a)(2)(B) by deleting "remove and reduce to possession" and substituting "take;"

(2) Insert a new subsection 9(a)(2)(C): "collect or destroy any such species from areas not under federal jurisdiction except with the written permission of the landowner;"

(3) Insert a new subsection 9(a)(2)(D): "possess, sell, deliver, carry, transport or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);" and reorder the remaining subsections accordingly.

The proposed amendments would outlaw destruction as well as collection of endangered plants on federal lands, and collection and intentional destruction of such plants on non-federal lands without the permission of the landowner. The amendments would also prohibit possession and exchange of endangered plants that have been taken in violation of the two preceding subsections, i.e., collected from federal lands without a permit or from non-federal lands without the permission of the landowner.

The protection that is provided by the Act is undermined by extremely lax enforcement. Since the plant trade controls of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) came into effect 10 years ago, only one plant dealer has been prosecuted for violating the treaty. Not one person has been prosecuted for trading plant species contrary to the Act. The Fish and Wildlife Service and Animal and Plant Health Inspection Service (APHIS) have failed to act despite being in possession of documented allegations of violations. NRDC knows that the two agencies have been alerted to at least half a dozen alleged violations of CITES and one of the Act during this period.

Furthermore, the FWS and APHIS have delayed establishing clear policies on how to handle plant shipments for which CITES documents appear to be improper. Failure to resolve this issue has resulted in allowing importation of at least 58,000 wild-collected cycads from the Dominican Republic over the past 2 years. Since similar problems plague imports of orchids from Brazil, succulents from Madagascar, cyclamens from the Middle East and other CITES-protected species, the repercussions are alarming.

Finally, the FWS has allowed major errors to appear in the annual reports that it prepared pursuant to CITES and has failed to act promptly to correct them. For example, in 1982, almost half the cactus exports with CITES permits were accidentally left out of the report. Preliminary data for 1983 indicate errors of similar magnitude, i.e., almost 50%, for cactus imports and exports. These errors distort American and indeed world-wide understanding of the plant trade and its impact on wild population. They also undermine efforts to detect violations by comparing data in several countries' reports.

The Natural Resources Defense Council, Native Plant Society of Oregon, Waimea Arboretum, New England Wildflower Society, and LaVerne Collard ask the Subcommittee to include report language instructing the FWS and APHIS to improve their enforcement of the ESA and CITES.

PREPARED STATEMENT OF WILLIAM D. BLAIR, JR., PRESIDENT OF THE NATURE
CONSERVANCY

Mr. Chairman, Members of the Subcommittee. My name is William Blair, I am the President of The Nature Conservancy. The Nature Conservancy is a national, private, non-profit organization with over 200,000 members. Our principal objective is to identify the best and most important examples of America's ecosystem types and rare species habitats, and to provide protection for the most threatened of those natural areas and species. We are the largest private organization engaged in species conservation in the United States today. The Nature Conservancy, acting sometimes independently and sometimes in cooperation with federal, state, and local conservation agencies, has helped preserve more than 2,000,000 acres of natural lands since 1954. Included in this acreage are the habitats of 208 animals and 11 plants listed as threatened or endangered on the federal list and 349 plant species under review for potential federal listing. We have also protected numerous state-listed species in virtually every state. In recent years, as a result of cutbacks in government spending, The Nature Conservancy has spent more money for acquisition of critical habitats for the preservation of endangered species than has the United States Fish and Wildlife Service.

We strongly endorse H.R. 1027, the legislation introduced by Congressman Breau and Congressman Young, to reauthorize the Endangered Species Act for another four years. No other piece of federal legislation has been more significant in the

field of conservation. The Nature Conservancy believes that the preservation of this country's biotic diversity is one of the most important issues facing the country today. As the Baird Professor of Science at Harvard, Edward O. Wilson, has noted, "The worst thing that can happen to the human race is not energy depletion, economic collapse, or conquest by a totalitarian government. The one process that will take millions of years to correct is the loss of species diversity by the destruction of natural habitat. This is the folly our descendants are least likely to forgive us." It is the Conservancy's mission to protect and preserve that diversity. The Endangered Species Act has the same mission. We urge the Congress to reauthorize this vital piece of legislation. Our concern, however, is not just that the Endangered Species Act be reauthorized without substantive changes. Our concern is also that Congress allocate the necessary resources so that the Act can truly accomplish its goals.

The tragedy of the Endangered Species Act is not that it is a poorly written law. In our opinion the contrary is true. The Endangered Species Act as reauthorized in 1982 is a fundamentally sound piece of legislation that provides the United States Fish and Wildlife Service with the necessary legal authority to do a proper job of preserving endangered species. The potentially fatal flaw is that the Act is seriously underfunded.

LISTING

Identification is the first step in protection. Identification in the Endangered Species Act is found in Section IV, the Listing process. Protections of the Act cannot be afforded a species that is not listed under Section IV. If the Fish and Wildlife Service is not provided with sufficient resources to do proper listing, they are unable to extend protections to the many species that warrant it.

Since 1973 the list of threatened and endangered species has increased by about 429 species, an average of 39 per year. Currently, however, there exist more than 1,000 additional candidate species for which there is sufficient information to warrant proposals to add them to the list. Such proposals cannot be processed, however, because of inadequate resources. If this backlog of candidate species were to be "processed" at a rate equal to the recent historical average, it would take more than 25 years just to extend protection to those species already known to need protection now. This does not even begin to address the literally thousands of other species that are suspected to be in a threatened state. Clearly there is a desperate need for increased resources in the listing process.

The primacy of information in this process is absolute. Without that information, a listing would not be warranted. Without a listing, protection would never occur. Worse yet, with the wrong kind of information, the wrong kind of protection occurs.

The Nature Conservancy has long recognized this as the central fact in the preservation of species. We have been working for more than ten years to establish an information base that can guide this process. We call this system a Natural Heritage Program. Natural Heritage Programs are permanent computer information systems. These programs compile data on the existence, characteristics, numbers, condition, status, location and distribution of rare or declining species and habitats and other uncommon natural features in a state or region. Since the establishment of the first Heritage Program in South Carolina, The Nature Conservancy has helped to launch similar programs in 34 states. The original goal of the Heritage Program continues to guide its efforts today. In order to make sound decisions about the allocation of conservation resources, the single most important need is for accurate information about the status of species and ecosystems.

The Heritage Programs have demonstrated time after time their ability to provide that information. Some examples are:

The Tall Grass Prairie in North Dakota once covered 2,000,000 acres in the Red River Valley. No high-quality example of this prairie type was known to remain in the state until the North Dakota Natural Heritage Program field checked 800 possible sites. This effort found five sites meriting preservation. These sites will be registered by the State and The Nature Conservancy for their protection;

The Washington Heritage Program alerted the National Park Service that its plans for a scenic viewpoint would destroy one of the five known populations for Golden Indian Paintbrush, a federal candidate plant species. The Park Service decided to modify its plan;

The Washington Heritage Program also located *Howellia aquatilis*, known in four sites only, in a grazing allotment within a National Wildlife Refuge. The Heritage Program worked with the Refuge staff to develop a management plan for the area to protect the rare plant. Later the area was added to an existing Research Natural Area and fenced;

The largest remaining population of an endangered species endemic to North Carolina, Cooley's Meadowrue, was located by the North Carolina Heritage Program and protected through a registry agreement with North Carolina Power and Light Company and with International Paper Company;

The Massachusetts Department of Transportation planned to route a highway across one of the few sites of the rare *Eupatorium leucolepis* var. *nova-angliae* (white bracted boneset), Category 1 for federal protection. This site supports 60% of the world's population of the species. Heritage Program staff meetings with state highway staff resulted in a realignment to minimize damage. All this was done before right-of-way was secured, land was acquired, and the final design was made; and

In Florida, Seminole Electric Cooperative narrowed selection of sites for a coal-fired electric generating plant to two locations. The preferred location was Alum Bluffs, an area adjacent to the Appalachicola River. The State Department of Environmental Regulation asked the Heritage Program to provide detailed ecological data on the site. After reviewing the biological data, the Cooperative chose another locality. When the option on Alum Bluffs expired, the conservancy acquired the site.

Heritage information frequently shows that a species is sufficiently recovered to be removed from the list or that it wasn't as rare as had been thought in the first place. For example:

In Wyoming the Heritage Program reduced the number of federally considered species from 19 to five, finding greatly increased numbers of many species that had been considered rare;

In Colorado, of 25 Category II plant reviews, 14 were recommended for lower status as a result of Heritage Program research;

The Arizona Heritage Program has suggested that 24 species be removed from the federal list; and

In Ohio, at least 15 species believed extirpated in the state have been rediscovered in field studies conducted by the Heritage Program.

This information has resulted in recommendations that certain species be removed from federal and state lists. This obviates the need for the production of a recovery plan, acquisition of critical habitat, etc. Accurate information at the start of the process can save money and a lot of wasted effort.

These examples are not offered to point out deficiencies in the information-gathering abilities of the Fish and Wildlife Service. Quite the contrary. In many cases the Fish and Wildlife Service has contracted with the Heritage Programs to obtain the necessary information. What these examples point out is the size of the job of gathering the necessary data on species. And data costs money. The Conservancy believes that the current funding levels for the listing process do not adequately address the need. In fact, there are species that have suffered potentially irreparable harm and have been brought closer to extirpation for lack of funding. These species are literally dying off while they wait for a well-deserved listing.

The Texas Henslow Sparrow, for example, has apparently become extinct within the past year, even as the Fish and Wildlife Service was trying to decide whether it should be listed. The Arizona Agave, a desert plant, occurred in a dozen or so different sites as recently as 1980. Today this plant remains at a single site.

In Texas, a status report on a plant (Large-Fruited Sand Verbena) was completed in May 1983 with a recommendation that the plant be added to the federal list. At the time there was only one known population. Since then, a biologist has checked the site and found no plants. While waiting for a listing, the plant has apparently become extinct.

In Arizona, a status survey completed by the Heritage Program in 1979 identified the Tarahumaro frog as a species in need of special attention. At that time, there were fewer than 100 in existence. The species was recommended for listing in 1983, but lack of funding from the Fish and Wildlife Service for sufficient status work deterred the effort. Since that time, the last Tarahumaro frog in Arizona has apparently disappeared.

The Nature Conservancy believes that the current proposed budget for the listing process in the Endangered Species Act (\$2.9 million) is woefully inadequate to do the job. Of the 405 full-time equivalent employees working for the Endangered Species Office, 58 are assigned to the listing function. As we have pointed out before, if that number remains constant, it would take nearly 25 years from today just to process the listing package for all of the species known to need protection. The Conservancy believes that authorization levels should be established that would allow at least \$15 million annually for the listing process, and that a portion of those funds be directed at increasing the number of personnel involved with the listing.

STATE GRANTS

A key element of any successful recovery of a species is the cooperative efforts of the state conservation agencies. Section 6 of the Act provides financial assistance for these cooperative programs. They are an integral part of the recovery and data-gathering process.

When the state grants program was launched in 1976-77, there were 16 cooperative agreements. Today, there are cooperative agreements with 44 states for wildlife and 15 for plants. That is a nearly four-fold increase in the number of agreements. Tragically, however, the dollars available to the Section 6 program are no greater today than in 1977. For Fiscal Year 1985, the Section 6 program was funded at \$4 million. The Endangered Species Office (OES), however, received applications for 296 projects totalling \$13.7 million. With the monies available, the OES was able to fund only 146 of those projects, less than half.

In addition, the current financial situation of the Section 6 program is acting as a disincentive for the states. As more and more cooperative agreements are signed while the pool of money remains constant, each State's share decreases. States that are contemplating entering into a much needed cooperative agreement, seeing the dwindling resources, simply choose not to proceed. Yet the goal of Section 6 is to encourage such agreements. If the Section 6 program is to function at a level commensurate with the need, it must receive more funds. These funds would have the additional attraction of being matched by state dollars, dramatically increasing the power and effectiveness of these dollars. Authorization levels should be increased to accommodate the appropriation of at least \$15 million annually to the Section 6 program.

UNITED STATES FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT

There are currently 73 listed species that occur on National Forest lands and 86 listed species that occur on Bureau of Land Management lands. This doesn't even take into account those species waiting for listing that occur on these lands. Under the Endangered Species Act, these agencies are under an obligation to ensure the protection of listed species. The Act is sufficiently clear in this regard. The problem again, is resources. Currently only 7% of the Forest Service's Wildlife and Fisheries budget (proposed at \$36.607 million for Fiscal Year 1986) is being used for conservation of endangered species. The Bureau of Land Management has been able to implement only 26 of the 44 recovery plans it has for species on its land. The Nature Conservancy recommends that authorization levels be sufficient to ensure that at least \$5 million is available to each agency annually to carry out its obligations under the Act.

The other components of the Endangered Species Act—recovery, international work, law enforcement—are all integral parts of the whole Act. Each component must function at its maximum capacity to truly protect endangered species. The Nature Conservancy's expertise lies primarily in the data-gathering aspect of the Act, and we have discussed that specifically. Many other concerned parties will present testimony to this Committee on the compelling need for more resources throughout all the functions of the Act. The Nature Conservancy heartily endorses an authorization level that would allow appropriations of at least \$65 million for all functions of the Act, reiterating our specific recommendations that \$15 million be devoted to listing, \$15 million to Section 6 and \$10 million to the Forest Service and the Bureau of Land Management.

PROPOSED AMENDMENTS

I spoke earlier of the backlog in the United States of species that have formally been identified by the Fish and Wildlife Service as candidates for listing but which, because of the limited resources available to the Act, do not receive much needed protection. The Nature Conservancy's Heritage Programs have provided several examples of how such species decline, some to the point of extinction, while waiting for this protection. In order to alleviate this problem, the Conservancy supports an amendment to treat candidate species as "proposed" species under Section 7(a)(4) of the Act. This would require federal agencies to confer with the Secretary about any action on their part that may adversely affect the species. This process is less rigid than the Section 7 consultation process, but will provide a small measure of needed protection for these candidate species.

The Nature Conservancy also supports an amendment to correct an inequity in the Act. Currently, plants do not receive the same treatment and protection on non-federal lands that animals do. Individuals can destroy, uproot or take plants from

lands in private or state ownership. Several excellent examples of the unfortunate results of this contradiction have been provided this Committee by the Garden Club of America in its testimony. We support an amendment that would change Section 9(a)(2) of the Act to prohibit the collection, vandalism, or taking of protected plant species on private lands without the written consent of the landowner.

Lastly, The Nature Conservancy opposes any amendment that would weaken the Endangered Species Act by allowing western water development interests special treatment and exemptions under the Act. The Endangered Species Act is designed to protect endangered species. Any action that allows the degradation of a species is contradictory to the Act and ought not to be allowed under this Act. There are significant safeguards built into the Act for any special interest that wishes to appeal an action it feels is unwarranted. The ability to challenge the decisions brought about by the Act already exists. We see no need to institutionalize an exception to the requirements of the Act, when an appeal process already exists.

In closing, I would like to thank the Committee for the opportunity to present our views on this vital piece of conservation legislation. The Conservancy looks forward to a successful reauthorization of the Act at increased funding levels, and we look forward to working with this Committee toward that goal.

PREPARED STATEMENT OF SAFARI CLUB INTERNATIONAL

Safari Club International is pleased to express strong support for H.R. 1027—legislation to reauthorize the Endangered Species Act through fiscal year 1988.

As you are well aware, Safari Club International is an organization of sportsmen and women dedicated to the conservation of wildlife, the preservation of sport hunting as a wildlife management tool, and the protection of sport hunter's rights. With 78 chapters, SCI has an active membership corps of 15,000 sportsmen, and with the affiliation of 37 state, regional, national and foreign sportsman organizations, SCI represents a network of more than 900,000 hunter/conservationists.

As stated in the Senate Report to the Endangered Species Act Amendments of 1982, "the license-buying sportsman is recognized as an active and dependable conservationist who believes in the protection of endangered species and who finances State endangered species protection programs." (S. Rep. No. 418, 97th Cong., 2d Sess. 15 (1982)).

These words do not have a shallow ring as sportsmen are the true conservationists and, as a group, are one of the most ardent supporters of the Endangered Species Act and the noble wildlife conservation and restoration goals therein. For instance, Safari Club International will shortly present a grant of \$68,250 to Zimbabwe's Department of National Parks and Wildlife Management in support of wildlife research and a \$45,000 grant to the National Forestry Commission of Zimbabwe for wildlife conservation programs. A grant of \$15,800 was recently given by SCI to the Sudanese Department of Wildlife Conservation and National Parks for the purchase of patrol motorcycles and other anti-poaching vehicles. Closer to home, Safari Club International recently provided the lion's share of the funding to underwrite the Michigan Department of Natural Resources' translocation of 30 moose from Ontario, Canada to the Michigan Upper Peninsula in an effort to restore the moose population to its historic range. And two weeks ago, SCI made a \$10,000 grant to the Florida State Game and Fresh Water Fish Commission to fund a disease research program on Florida's official state animal, the panther, which is an endangered species. In fact, in the short 13-year history of Safari Club International, we have contributed over \$6.5 million to a variety of wildlife conservation, habitat preservation, and anti-poaching programs.

Safari Club International fully supports the Endangered Species Act and recognizes it as a critically vital cornerstone in the drive to conserve, restore, manage and protect our wildlife resources.

Safari Club International believes it is imperative that the States have adequate funding to develop conservation programs pursuant to the Endangered Species Act. Inasmuch, Safari Club International in 1982 supported the increase of the federal share of funding with respect to federal-state cooperative programs established under Section 6 of the Endangered Species Act. Safari Club International supports an enlargement of federal cooperation with the States provided that the States retain their historic and traditional management authority.

Safari Club International is also concerned that a recent decision by the Eighth Circuit Court with respect to timber wolves in Minnesota will serve as a springboard to undermine the traditional authority of the States to manage resident wildlife populations according to accepted and proven scientific practices. Safari Club

International, therefore, respectfully requests that this Subcommittee look closely at the court decision to ensure that the provisions of the Endangered Species Act itself are not turned on their face to work against wildlife conservation by thwarting sound wildlife management programs of the States.

It has been the longstanding policy of Congress and the Department of Interior to recognize properly that regulated sport hunting does not constitute commercial activity. Aspects of a sport hunt, such as dealings of a hunter with his taxidermist, guide, outfitter, travel agent, airline or shipper are incidental to the primary purpose of the hunt and, as such, do not constitute commercial activity. The legislative histories to the Endangered Species Act Amendments of 1982 and the Lacey Act Amendments of 1982 reinforce this established policy. (See S. Rep. No. 418, 97th Cong., 2d Sess. 27 (1982); S. Rep. No. 123, 97th Cong., 1st Sess. 12 (1981); and, H.R. Rep. No. 276, 97th Cong., 1st Sess. 21 (1981)).

Although the legislative histories substantiate this policy, confusion within the sportsman community inevitably recurs whenever a new regulation is promulgated with respect to commercial activity. Therefore, Safari Club International requests that this Subcommittee consider the adoption of an amendment to clarify this matter in a statutory fashion once and for all. We respectfully suggest the following:

Section 3 of the Endangered Species is amended by adding at the end of paragraph (2) the following: ", or lawful dealings of a sportsman with a taxidermist, guide, outfitter, travel agent, airline or shipper."

Safari Club International supports a strong Section 7 which requires Federal agencies to ensure, through consultation with the Departments of Interior and Commerce, that Federal projects do not jeopardize a listed species or adversely affect its critical habitat. Section 7, as it presently stands, poses a fair balancing of environmental and economic factors.

Lastly, Safari Club International is concerned with the continued unregulated subsistence take of wildlife in Alaska and the religious take of certain endangered species by Indians elsewhere. Such sustained unregulated yields appear to undermine the integrity and effectiveness of the Endangered Species Act and other wildlife conservation statutes designed specifically to protect our wildlife resources. Safari Club International respectfully recommends that this Subcommittee examine closely such effects to determine the nature and level of this activity which may be occurring to the detriment of endangered and other wildlife species.

In closing, Mr. Chairman, Safari Club International is very willing to work with you and your staff to ensure the reauthorization of a strong Endangered Species Act.

Thank you for this opportunity to present our views on behalf of the American sportsman.

PREPARED STATEMENT OF MARK A. FRAKER, SOHIO ALASKA PETROLEUM CO.

My name is Mark A. Fraker, and I am a Senior Environmental Scientist with Sohio Alaska Petroleum Company in Anchorage, Alaska. For more than a decade I have conducted research on bowhead and beluga whales in the Arctic. The subject of these studies has ranged from basic biology to responses to offshore petroleum operations. Prior to joining Sohio Alaska, I was in private business consulting to the Canadian and Alaskan oil industry, the Canadian Government, U.S. Minerals Management Service, and the International Whaling Commission.

INTRODUCTION

The Beaufort Sea is one of the most promising areas in North America for discovering new reserves of oil and gas. A major factor that is inhibiting exploration is the seasonal drilling restriction which has been put in place to protect the bowhead whale, an endangered species which is also the subject of important subsistence hunts by Alaskan Eskimos. This seasonal drilling restriction prohibits the oil industry from drilling in waters of the Beaufort Sea during approximately two months of each year of the fall whale migration period. In addition, there has been significant restrictions placed on marine seismic exploration, and large tracts of potentially important areas have been deleted from lease sales. The restrictions that are in place result in significant time delays can radically increase the cost of an exploration well by tens of millions of dollars.

In the late 1970s, there was a dearth of information on movements, biology and numbers of bowheads, and on effects of offshore petroleum operations. Since then about \$20 million have been spent on research addressing these questions, including over \$14 million by Minerals Management Service (MMS). In these studies it has

been possible to ascertain the short-term (hours, days, weeks) and some longer-term (among years) effects. However, despite favorable research results, the National Marine Fisheries Service (NMFS) has prohibited drilling operations during the open-water season when bowheads are present. The industry and MMS are placed in a "Catch 22" situation: no drilling can take place because of a lack of information on the long-term effects, but we will never be able to determine the long-term effects until drilling is permitted when whales are present. The appropriate research has been conducted and nothing we have learned suggests serious medium- or long-term effects. The next logical step is to permit drilling when bowheads are present, with appropriate monitoring.

POPULATION STATUS

The "bowhead problem" manifested itself in the mid-1970's when the International Whaling Commission became alarmed at the relatively large and increasing take of bowhead whales by Alaskan Eskimos.¹ The level of concern was heightened because the limited information at the time suggested that the population might have been made up of fewer than 1000 whales and there appeared to be an extremely low rate of reproduction, perhaps less than 2% per year. It is now known that there are at least 4000 whales in the population² and probably considerably more. The annual rate of reproduction is now believed by most biologists to be a minimum of 7%.³ Furthermore, the results of recent studies using calibrated aerial photographs have shown that there is a balanced distribution of whales of all size classes in the population, thus indicating a normal situation with respect to young animals growing and entering the reproductively mature part of the population. In short, all indications are that the bowhead population is biologically healthy.

A major question relates to why the Western Arctic bowhead population has not recovered to anything approaching original numbers. Based on whaling records, it is thought that there were possibly as many as 20,000 bowheads prior to commercial whaling, yet there clearly is only a fraction of that number in existence today despite the absence of commercial whaling for more than three-quarters of a century.⁴ The most plausible explanation for this puzzle is that there were in fact two separate stocks of bowheads in the Western Arctic, one that inhabited the Bering and Chukchi Seas during summer and another that inhabited the southeastern Beaufort. Today, the former stock exists in very small numbers, if at all, due to overexploitation by the commercial whalers, while the second stock is in comparatively good condition and may in fact be as numerous today as it has ever been.

EFFECTS OF OFFSHORE PETROLEUM OPERATIONS

Eskimos, environmentalist groups and government agencies have stated their concerns about possible effects on the bowhead from offshore petroleum operations. These concerns fall into two categories: (1) effects of underwater noise and disturbance, and (2) effects of oil. The MMS has spent approximately \$14 million dollars since 1979 to study the effects of offshore petroleum operations on species of endangered whales, particularly the bowhead. Much of this research was carried out in the Canadian Beaufort Sea where bowheads and petroleum operations have coexisted for about a decade. Most of the research effort has been directed at studying the response of whales to underwater noise and disturbances from normal operations, but there has also been some study of the effects of oil on skin and on baleen (the whale's feeding apparatus).

Noise and disturbance

In the past 10 years or so it has come to be widely appreciated that marine mammals use underwater sound extensively and that sound travels underwater much more efficiently than it does in air.⁵ Furthermore, unlike light, sound underwater is useful to marine mammals day or night, summer and winter, and in both clear and turbid water. The appreciation of the usefulness of underwater sound has led to concerns that man-made underwater sound might seriously disturb marine mammals, interfere with communication, or mask important environmental sounds.

¹ Fraker, M.A. 1984. "Balaena mysticetus: Whales, Oil, and Whaling in the Arctic." Sohio Alaska Petroleum Co., and BP Alaska Exploration Inc., Anchorage, Alaska. p. 18.

² Ibid., p. 24.

³ Ibid., p. 25.

⁴ Ibid., p. 26.

⁵ Ibid., p. 30.

It has been learned that bowheads and other whales react at short range (1-4km) to moving vessels.⁶ The whales respond by moving away from the approaching vessel, and this response ends after the vessel passes. The response is greatest to vessels that move quickly and erratically, and least to vessels that move slowly and steadily.

Seismic exploration produces the most intense sounds of any offshore petroleum operation (as high as 248 dB re μPa at 1M). There have been numerous incidental observations of bowheads at various distances from seismic exploration vessels.⁷ In some cases there have been subtle, but statistically, differences in certain diving and surfacing parameters. In recent experiments using full-scale seismic vessels, clear responses have been obtained only at close range (5km) and high sound intensities (160 dB re μPa).

Bowheads respond to aircraft below 1500 ft., particularly if the aircraft circle overhead for extended periods of time. Potential disturbance by aircraft is really a concern most relevant to researchers using aircraft as observation platforms, rather than to industry aircraft following routine, straight-line tracks. Bowheads are tolerant of stationary operations such as drilling or dredging, and they have been recorded close to operations of this type on many occasions.

It is likely that bowheads find stationary operations less disturbing than moving vessels because the former are completely predictable, while the latter are less predictable particularly if the vessels are moving quickly or erratically.

Effects of oil

There is uncertainty about the effects of oil on bowheads and other whales, in part because there has been no documented case of a whale being killed or injured by oil. The most useful information comes from laboratory experiments where oil was held in contact with small areas of the skin of captive porpoises for prolonged periods (continuously for up to 75 minutes) or test sections of baleen were deliberately fouled with oil to test effects on water flow and filtration efficiency.⁸ Even prolonged contact with oil resulted in only mild and transient damage which was repaired within a few days. Similarly, the effects on baleen were reversible in terms of minutes, hours or days. The effects of ingestion of oil by whales have not been studied experimentally. However, it has been determined that cetaceans possess an enzyme system (cytochrome P450) capable of breaking down and detoxifying petroleum hydrocarbons.

Overall effects of offshore petroleum operations

Because extensive petroleum exploration operations have taken place in the Canadian Beaufort Sea since 1976, it is instructive to examine the use by bowheads of what has come to be called the "Primary Industrial Area".⁹ Over the years 1976 to 1983, the use of this area by bowheads was as follows: 1976—high; 1977—high; 1978—low; 1979—low; 1980—high; 1981—moderate; 1982—low; 1983—low.

Thus, bowheads have not tended to make less use of this area over the eight years for which we now have data, although there have been differences between years. These annual differences probably owe to natural differences in oceanographic conditions.

Some residents of the North Slope Borough have expressed the opinion that bowheads migrating through the Alaskan Beaufort Sea in the fall have been displaced further offshore in the past few years, owing to offshore petroleum operations.¹⁰ However, aerial surveys conducted by MMS since 1979 have shown a consistent pattern: the whales use a migration corridor whose landward boundary is approximately the 20m depth contour and whose seaward boundary is at least the 50m isobath. Concern has also been expressed that bowheads may have been displaced from areas just east of Pt. Barrow where they had been seen feeding in significant numbers in the mid-1970's and not again until 1984. It is likely that the location of areas of abundant food are variable, so that the whales may not use exactly the same areas year after year.

⁶ Ibid., p. 36.

⁷ Ibid., p. 45.

⁸ Ibid., p. 52.

⁹ Ibid., p. 49.

¹⁰ Ibid., p. 51.

CONCLUSION

In the years since the first leases were sold in the Alaskan Beaufort, there has been an enormous increase in understanding of the biology and status of bowhead whales and of the effects of offshore petroleum operations. Yet we find a highly conservative approach to applying the results of this research and this has left the offshore petroleum industry with a very large and expensive burden which seriously impedes its ability to explore and discover the petroleum reserves that are vital to our nation's security.

Questions about effects of offshore petroleum operations do remain, and mainly these relate to long-term effects. There is nothing alarming in what we have learned from observations of short-term responses made over the past several years or from observations of bowheads in relation to the longer-term large-scale petroleum operations in the Canadian Beaufort. It must be realized that we will never have complete knowledge in this or any other areas. The research questions that can be approached have been carried out, and it is apparent that there are no significant short-term impacts on bowheads from offshore petroleum operations. The major questions that remain—those dealing with long-term effects—can never be answered in the abstract. The knowledge gained from other species of whales show that they can accept a considerable degree of activity in their midst, and the result of research on bowheads is compatible with this understanding. The only way to answer on the major outstanding questions is to drill the offshore areas and monitor for effects. If effects are detected, mitigative measures can be implemented.

To conclude, the nature and dimensions of probable effects on the bowhead are well enough known that we can reasonably proceed with exploration under less restrictive regulations. Currently the oil industry is not permitted to drill when the whales are present because the long-term effects are unknown, but any long-term effects cannot be determined until drilling can take place in the presence of the bowheads. It will never be possible to prove in advance that there will be no effects from some industrial action: it is impossible to prove a negative. This question can be resolved only when NMFS will permit during while bowheads are present and the appropriate monitoring is conducted.

PREPARED STATEMENT OF GERALD R. ZIMMERMAN, EXECUTIVE DIRECTOR, UPPER COLORADO RIVER COMMISSION

Mr. Chairman and Members of the Subcommittee, the Upper Colorado River Commission is the administrative agency created by the Upper Colorado River Basin Compact of 1948. The Commission represents the States of Colorado, New Mexico, Utah, and Wyoming in matters relating to the development, utilization, and conservation of the water resources of the Upper Colorado River Basin. Because of its duty to administer the Upper Colorado River Basin Compact, the Commission has a vital interest in any reauthorization of the Endangered Species Act and in the impacts that the administration of this act has on the allocation and management of the limited water resources of the Upper Colorado River Basin.

A working group composed of representatives of the U.S. Fish and Wildlife Service, the U.S. Bureau of Reclamation, and the States of Colorado, Utah, and Wyoming, has been established to attempt to find solutions to conflicts between the protection of endangered species and water development and management in the Upper Colorado River Basin. Through a Memorandum of Understanding the above mentioned parties have agreed.

"... to cooperate in discussions seeking ways to develop and implement a program of reasonable and prudent alternatives which will enable Federal agency actions associated with water project development and depletions in the Upper Basin of the Colorado River to proceed pursuant to Section 7 of the Endangered Species Act without the likelihood of jeopardizing the continued existence of any threatened or endangered fishes, while fully acknowledging and considering the beneficial uses of water pursuant to the respective State water rights systems and the use of water apportioned to a State pursuant to the compacts concerning the waters of the Colorado River."

Similar efforts are being conducted in the Platte River Basin of Colorado, Nebraska, and Wyoming.

In recognition of the cooperative efforts by the Fish and Wildlife Service, the Bureau of Reclamation and the several States, the Upper Colorado River Commission commends and encourages these cooperative efforts in the administration of the Endangered Species Act. The Commission supports the use of groups composed of States, Federal agencies, and other interested parties to achieve administrative

solutions to issues such as those addressed in the Endangered Species Act. This process is consistent with the directive provided by Congress in Section 2(c)(2) of the Act which states that it is the "... policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."

Because of the ongoing efforts to seek administrative solutions to endangered species issues in the Upper Colorado River Basin, the Upper Colorado River Commission supports a simple two-year reauthorization of the Endangered Species Act. This two-year period will allow sufficient time for the working group to propose viable administrative solutions to the present conflicts between endangered species and water development. At the end of this two-year term, Congress should reexamine this matter to determine if such administrative solutions are workable and can be effectively implemented.

A two-year reauthorization of the Endangered Species Act would be advantageous for two other reasons as well. First, an additional two years without substantive amendments should provide sufficient time to complete the regulations required to implement the 1982 amendments to the Endangered Species Act. Second, a two-year reauthorization would provide a five-year time period from 1982, when the Endangered Species Act was last amended, to observe the effects of those 1982 amendments.

In summary, the Upper Colorado River Commission supports a simple two-year reauthorization of the Endangered Species Act in light of the ongoing attempts to achieve administrative solutions to eliminate the conflicts between the protection of the endangered species and the development, allocation, and management of the limited water resources in the Upper Colorado River Basin. Congressional acceptance of the Commission's recommendations would signal Congress' support of cooperative efforts by State, Federal, and other agencies to seek administrative solutions to endangered species issues.

On behalf of the Upper Colorado River Commission, I want to thank the members of this Subcommittee for granting us the opportunity to present our position concerning the reauthorization of the Endangered Species Act.

PREPARED STATEMENT OF THE WESTERN STATES WATER COUNCIL

Dear Mr. Chairman and Committee Members, the Western States Water Council is an organization of fifteen western states whose members are appointed by and serve at the pleasure of the western governors. The Council has a vital interest in implementation of the Endangered Species Act and its impact on western states' management of their limited water resources.

BACKGROUND

In July 1984, the Department of the Interior released an updated list of endangered and threatened species. The list includes nearly 60 endangered or threatened fishes alone. Over half of these have an historic range covering one or more western states including Arizona, California, Colorado, Nevada, New Mexico, Texas, Utah, and Wyoming. In whole or in part these are arid or semi-arid states where limited water resources are in great demand. Moreover, in the past year alone at least three additional western U.S. fish species have been listed as endangered or threatened (the Yaqui chub, Yaqui catfish and Beautiful shiner in Arizona, New Mexico and Mexico), and another dozen fishes have been proposed for listing:

1. The Modoc sucker—California;
2. The Owens tui chub—California;
3. The desert pupfish—California/Arizona;
4. The Sonora chub—Arizona;
5. The Fish Creek Springs tui chub—Nevada;
6. The Railroad Valley springfish—Nevada;
7. The desert dace—Nevada;
8. The Pecos bluntnose shiner—New Mexico;
9. The June sucker—Utah;
10. The Warne sucker—Oregon;
11. The Foskett speckled dace—Oregon; and
12. The Hutton tui chub—Oregon.

With respect to the above proposed listings, each notes an existing or potential adverse impact on these species due to the destruction or modification of habitat by such water-related activities as the construction of dams and impoundments, other instream barriers, water diversions and depletion, channelization, siltation, the

lining and dredging of irrigation canals, ground water pumping, livestock watering, and water pollution.

As the list of endangered and threatened species lengthens, conflicts with western water-related resource management will increase. For example, proposed listings and listed fishes could affect features of the Central Utah Project, the Central Arizona Project, municipal water supply projects for Cheyenne and the Denver metro area, and other projects which are actually under or moving to construction.

The problem is not limited to the West and Southwest. Other fishes on the endangered species list are found in the States of Arkansas, Oklahoma, Tennessee, Ohio, Alabama, Florida, Georgia, North Carolina, Virginia, and Maryland. Nor is the problem limited to fish. Various species of birds and plants which use riverine habitats have been listed, or proposed for listing, as endangered or threatened species.

1982 ENDANGERED SPECIES ACT AMENDMENTS

Recognizing the importance of preserving our genetic resources, Congress enacted the Endangered Species Act. However, Congress also recognized the potential conflict between implementation of the Act and essential development and management of other natural resources and established specific consultation and exemption procedures. Despite the 1982 amendments, which greatly improved conflict resolution mechanisms in the Act, problems remain which are a cause of concern to western states' water interests and others.

The Western States Water Council suggested and actively supported many of the 1982 changes to section 7 to streamline the Act's consultation and exemption procedures, eliminate possible delays, and provide for greater participation in the decisionmaking process by non-federal interests. Unfortunately, the Fish and Wildlife Service has yet to promulgate final regulations implementing all these changes.

The Council also had a hand in preparation of subsection 10(d) of S.2309, which the House accepted, adding a new section 2(c)(2) which states that: "It is further declared to be the policy of Congress that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."

The accompanying Senate Report explains that the purpose of the amendment is to "recognize the individual state's interest and, very often, the regional interest with respect to water allocation." The report goes on to recognize that "most of the potential conflicts between species conservation and water resources development can be avoided through close cooperation between local, state and federal authorities."¹

However, little has been done to effectively implement the above congressional statement of policy. Conflicts between implementation of the Act and western water resources development and management remain unresolved.

ADMINISTRATIVE RESOLUTION OF CONFLICTS

The Western States Water Council supports the resolution of such conflicts through administrative means. The Fish and Wildlife Service should be directed to implement the Congressional policy, as expressed in the 1982 Act, to "cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."² Congressional purpose and policy should be redefined explicitly to state that the conservation of endangered and threatened species is to be achieved in a manner which avoids conflicts with western water resource development and water rights.³

Every effort should be made to mitigate any negative impact on the species through measures which do not inhibit water development and use. Such measures may include habitat modification, artificial propagation (e.g., through hatcheries), appropriate uses of federal reservoirs, reduced planting of competing exotic sport fishers, and other measures which can further the conservation of species without impairing beneficial uses under state law.

The Department of the Interior has established two joint working groups comprised of representatives of the Fish and Wildlife Service, the Bureau of Reclamation, and the States of Colorado, Utah, and Wyoming in one instance, and Colorado, Nebraska, and Wyoming in the other. These groups, along with environmental orga-

¹ Senate Report 97-418, dated May 26, 1982.

² 16 U.S.C. section 1531(c)(2).

³ WSWC position statement, "Endangered Species Act," July 31, 1981, adopted in Coeur d'Alene, ID and "Amendment to Section 404 of the Clean Water Act," Jan. 13, 1984, adopted in Phoenix, AZ.

nizations and water user interests, are trying to find solutions to conflicts between endangered species protection and water development and management in the Upper Colorado River and Platte River Basins. Such efforts should be encouraged as being wholly consistent with the Congressional directive in section 2(c)(2).

SECTION 7 CONSULTATIONS

In 1982, with respect to the consultation process under Section 7, this Committee's report accompanying H.R. 6133 noted: "During fiscal years 1979, 1980, and 1981, a total of 1,945 formal consultations resulted in the issuance of a written statement. Of these, 1,772 resulted in a biological opinion of no jeopardy and 173 resulted in a finding of jeopardy (or 8.9% of these formal consultations)."⁴

These figures have been used to illustrate the past success and effectiveness of the consultation process. While this may be true, other explanations may also exist.

First, the total number of formal consultations required (1,945) highlights the pervasive distribution of endangered and threatened species, and therefore the potential for conflicts. Further, most biological opinions are issued in routine compliance with the Act, and 173 jeopardy opinions represents a significant number of problems. At least they represent an obstacle to 173 projects. Second, the experience of western states' water interests demonstrate that some jeopardy opinions have been avoided through negotiations and agreement on measures to mitigate the potential adverse impact on endangered and threatened species, or actually enhance their status.

Section 7(b)(4) of the Act specifically provides for such mitigation, which has long been an accepted practice for the protection of fish and wildlife resources, particularly as it relates to water resource development and management. However, ambiguity exists in the Service's administration of the Act with respect to the standard or standards for determining and requiring appropriate mitigation measures, and fixing responsibility for such actions by federal, state and local agencies and project sponsors.

Our experience with different water projects in the West generally, and particularly the Upper Colorado River and Platte River Basins, illustrate existing and potential problems related to the present consultation process and confusion about the limited requirements of section 7 to protect, not enhance, the current status of endangered and threatened species. The following is a brief outline of some of these problems. A more detailed project-by-project description is appended to this testimony. However, these examples are by no means an exhaustive tabulation of all existing problems and concerns.

In 1961, the City of Cheyenne prepared a plan to divert water from the Upper Colorado River Basin into the North Platte drainage. The Fish and Wildlife Service issued an opinion stating that the proposed diversion threatened the continued existence of endangered and threatened Colorado River Basin fishes. However, the opinion was reversed after the Cheyenne Board of Public Utilities agreed to provide up to \$180,000 to participate in a plan for the conservation of the fish.⁵

Of note, the new opinion distinguished between the project's threat to the continued survival of the species and its impact on recovery. The opinion states that the phrase, "jeopardize the continued existence of" is defined by regulation as an "activity or program that can reasonably be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild."⁶ Therefore, any action by a project sponsor or other non-federal interest which might impede recovery of a species is defined as jeopardizing its continued existence."

The Moon Lake Project near Bonanza, Utah, is a 400-megawatt coal-fired powerplant now under construction by the Deseret Generation and Transmission Cooperative (Deseret G&T). The plant will divert 30 cubic feet per second (cfs) from the Green River for cooling purposes. The Fish and Wildlife Service originally issued a jeopardy biological opinion stating that the critical flow requirements for endangered fish species in the Colorado River Basin were not known, but until completion of a continuing study. "All official biological opinions on water withdrawal without approved mitigating measures or alternatives will state that the withdrawal from the Green or White Rivers could jeopardize the continued existence of these fish."

⁴ H. Rpt. 97-567, Part 1 dated May 17, 1982.

⁵ Fish and Wildlife Service Biological Opinion, dated May 29, 1981, addressed the USFS Denver Regional Forester.

⁶ 50 CFR section 402.02.

The opinion noted that the Utah Division of Wildlife Resources and Bio/West (an environmental consulting firm in Logan, Utah) had concluded that, "in and of itself the withdrawal of 30 cfs from the Green or White Rivers for the Moon Lake project would not jeopardize the continued existence of the fish species." Still, the Service claimed that, along with the cumulative impacts from other projects, their existence could be jeopardized. Subsequently, Deseret G&T agreed to pay up to \$500,000 for studies and programs designed to conserve the endangered fishes.⁷

In June, 1983, the Fish and Wildlife Service circulated a "draft conservation plan" for three endangered fishes in the Upper Colorado River Basin. This document suggested requiring maintenance of pre-1960 minimum flows. However, the Fish and Wildlife Service failed to compile and analyze endangered species data, which had been collected over the last twenty years, before making such a drastic proposal.⁸

In short, the requirements of the Act for protecting species under Section 7 may need better definition. The Western States Water Council questions the statutory basis from which the Fish and Wildlife Service has required state, local, and private project sponsors to agree to participate in recovery measures which enhance the status of a protected species in order to avoid a jeopardy opinion.

Section 7(a)(2) reads as follows: "Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the habitat of such species."

The phrase "not likely to jeopardize the continued existence of any endangered species" is a limited prohibition and the Fish and Wildlife Service has exceeded its statutory authority by defining the phrase by regulation to include recovery of the species. The Secretary's jeopardy opinion, as generally rendered by the Fish and Wildlife Service, may only take into account the impact of a proposed agency action (and subsequently any related project sponsor's actions) based on the effect on the "continued existence" of the species.

Section 7(b)(3)(a) continues: "If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the federal agency or applicant in implementing the agency action."

Such requirements, to avoid jeopardy, again may only be based on a project's threat to the "continued existence" of a species. Further, any non-federal project sponsor should only be responsible for an appropriate share of the cost of mitigating measures which are directly attributable to related project impacts.

Section 4(f) provides: "The Secretary [of the Interior] shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species. . . ."

Section (3) states: "The terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."

Such a stringent conservation standard is not required of federal agencies and project sponsors under Section 7. Rather, the Act places the affirmative responsibility of improving the condition of a species only upon the Secretary of the Interior. In other words, enhancement of a species' condition, or recovery, is a federal responsibility and cannot be required of project sponsors under pretense of Section 7(a)(2). Section 7(a)(2) only relates to situations where a federal agency action, and in turn the actions of a project sponsor, are likely to "jeopardize the continued existence" of an endangered or threatened species. It is only a mandate that the condition of a species may be made no worse by development than is already the case.

Thus, mitigating measures proposed by the Fish and Wildlife Service as an alternative to issuing a jeopardy opinion can only require a project sponsor to maintain a species' "status quo." Indeed, support for such an interpretation of the Act exists in traditional federal water policy which only requires projects to mitigate adverse impacts on fish and wildlife. The federal government should assume the cost of project-related endangered species enhancement measures.

Further, some forum should be established whereby disagreements over biological, hydrologic, and other scientific facts can be challenged and resolved. The Fish and Wildlife Service has sometimes rendered biological opinions which lacked factual

⁷ Fish and Wildlife Service Biological Opinion, dated May 13, 1981, addressed to Utah's State BLM Director.

⁸ Colorado Water Congress testimony on H.R. 1027, dated Mar. 14, 1985.

content and superficially addressed reasonable prudent project alternatives.⁹ Given the room for disagreement among experts, state and local interests should have access to some mechanism for challenging Fish and Wildlife Service determinations and receiving an unbiased judgment as to: (1) the minimum requirements to maintain a species' "continued existence," and (2) prudent and reasonable alternatives for mitigating direct negative project impacts.

In addition, an assessment of a project's cumulative effects is not required by the Act in rendering a biological opinion.¹⁰ The only basis, perhaps, for considering cumulative impacts, involves taking into account necessary measures for bringing about recovery of a species. Again, however, recovery efforts are only required of the Secretary of the Interior under Section 4(f), and are not required of any federal agency or project sponsor under Section 7(a)(2).

SUMMARY

In summary, some of the issues which have yet to be resolved and which are of concern to the Western States Water Council involve:

(1) Implementation of Congressional policy, as expressed in the 1982 Act, directing federal agencies to "cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species;"

(2) Failure to observe the distinction between sections 7(a)(2) and 4(f), and the related federal and state responsibilities;

(3) The biological, hydrological, and scientific integrity of Fish and Wildlife Service jeopardy opinions and recovery plans; and

(4) The final promulgation of rules implementing the 1982 changes to the section 7 consultation process.

We urge the Committee and the Congress to carefully consider the above comments.

WESTERN STATES WATER COUNCIL POSITION

Given the initiation of the Upper Colorado River and South Platte River Basins task groups, and the possibility for administrative remedies to the problems summarized above, the Western States Water Council supports a simple two-year reauthorization of the Endangered Species Act. Congress should then revisit the matter to determine whether or not administrative solutions have been found to conflicts between species conservation and vital western water resources development and management.

APPENDIX

THE CHEYENNE WATER DEVELOPMENT PROJECT

In 1961, a water supply plan was prepared for the City of Cheyenne known as the Cheyenne Water Development Project. The three-stage plan entails diverting water from the Little Snake River, a tributary of the Yampa River in the Upper Colorado River Basin, into the North Platte drainage. Stage one on the project was completed in 1967. The City of Cheyenne sought a 23,000 acre-foot diversion for stage two, and the Fish and Wildlife originally issued a jeopardy opinion based on the assumption that the diversion would jeopardize the continued existence of endangered and threatened Colorado River Basin fishes. The opinion was reversed after the Cheyenne Board of Public Utilities agreed to provide up to \$180,000 to participate in a plan for the conservation of the species.¹¹

On note, the new opinion distinguishes between the project's threat to the continued survival of the species and its impact on recovery. The opinion states that the phrase, "jeopardize the continued existence of" is defined by regulation as an "activity or program that can reasonably be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild."¹²

⁹ WSWC position statement, Endangered Species Act, July 31, 1981, adopted in Coeur d'Alene, ID.

¹⁰ Ibid.

¹¹ Fish and Wildlife Service Biological Opinion, dated May 29, 1981, addressed to the Denver Regional Forester (USFS).

¹² 50 CFR section 402.02.

THE WINDY GAP PROJECT

Similarly, with respect to the Windy Gap project in Colorado, the Fish and Wildlife Service determined it was not likely to jeopardize the continued existence of Colorado River fishes after requiring specific conservation measures to offset the impact of the project on the recovery of the fishes. These conservation measures included an average annual bypass of some 11,000 acre-feet to maintain downstream habitat. Further, the Northern Colorado Water Conservation District, the project's sponsor, agreed to fund the creation of backwater habitat areas and a field research team to evaluate habitat improvement techniques and continue collecting physical data. The Windy Gap Project would utilize existing features of the Colorado-Big Thompson Project to divert an average of 57,300 acre-feet of water from the Colorado River Basin to Colorado's eastern slope.³

THE MOON LAKE POWERPLANT

The Moon Lake Project near Bonanza, Utah, is a 400-megawatt coal-fired powerplant now under construction by the Deseret Generation and Transmission Cooperative (Deseret G&T). Using a series of shallow wells, the project would divert about 30 cfs from the Green River for cooling purposes. In addition, just over 300 acre-feet annually would be diverted from the White River, near Rangely, Colorado, for a related coal mining operation.

Originally, the Fish and Wildlife Service issued a jeopardy biological opinion which stated that the critical flow requirements for three endangered fish species in the Colorado River Basin were not known, but until a continuing study was completed, "all official biological opinions on water withdrawal without approved mitigating measures or alternatives will state that the withdrawal from the Green or White Rivers could jeopardize the continued existence of these fish." However, the jeopardy statement also included the following observation:

"This opinion is not agreed upon by all experts. The position of the Utah Department of Health, the Utah Division of Wildlife Resources, and the Bio/West (environmental consultant firm in Logan, Utah) is that in and of itself the withdrawal of 30 cfs from the Green or White Rivers for the Moon Lake project would not jeopardize the continued existence of the fish species. However, along with the cumulative impacts from other projects, their existence could be jeopardized."⁴

Subsequently, Deseret G&T and the Fish and Wildlife Service agreed on specific mitigating measures to include either: (1) negotiation of the contract purchase of up to 30.5 cfs (22,089 acre feet) of water from Flaming Gorge Reservoir from the Bureau of Reclamation; or (2) a contract to pay up to \$500,000 for the purpose of financing studies and/or programs designed to conserve the endangered fish species in the Green and White Rivers.⁵

The first option has been eliminated for at least two reasons. First, the purchase of water from storage in Flaming Gorge actually does nothing to resolve the problem as the depletion of water from the river basin would be the same. Second, implementation of this option would have required approval by the Utah State Engineer for the change in the point of diversion and nature of use. This would have been at least problematic, particularly given the fact that Deseret G&T already holds a valid state water right for the withdrawal of 30 cfs from the Green River, and Utah does not recognize instream flows as a beneficial use for which water can be appropriated.

Though the first option was dropped, such offset requirements by the Fish and Wildlife Service raise grave questions concerning the rights of Upper Basin States to deplete their entitlements under existing laws and compacts on the Colorado River approved and ratified by the Congress and the States.

In the Moon Lake case, the powerplant is under construction and negotiations are now under way to determine the appropriate sum of the required money. Of note, the \$500,000 figure was determined by taking the estimated total cost of present Fish and Wildlife Service recovery-management plans for endemic Colorado fishes, which is approximately \$20M, multiplied by 2.5% (which is equal to the proposed depletion of 22,089 acre-feet divided by the current depletion from the Green River of approximately 857,000 acre-feet).

³ Fish and Wildlife Service Biological Opinion, dated Mar. 13, 1981, addressed to the Lower Missouri Regional Director of the Bureau of Reclamation.

⁴ Bureau of Land Management, "Moon Lake Project Draft EIS," Jan. 8, 1981, p. 14.

⁵ Fish and Wildlife Service Biological Opinion, dated May 13, 1981, addressed to Utah's State BLM Director.

THE WHITE RIVER DAM

In 1978, the Utah State Legislature authorized construction of the White River dam and hydroelectric generation project in eastern Utah. The reservoir would supply water for development of oil shale resources in the Unita Basin, water for irrigating Indian lands, and a run of the river hydropower plant. The State of Utah, through project BOLD, has negotiated extensively with the Department of Interior to consolidate state lands and mineral lease holdings within the Unita Basin into economic mining units. A proposal ratifying the necessary exchange of federal and state lands was introduced in the 98th Congress. Providing an adequate and dependable water supply will be essential to future progress and development of the oil shale industry in eastern Utah.

A "no jeopardy" biological opinion was issued, with approved mitigating measures, after two years of consultation between the Fish and Wildlife Service and the Bureau of Land Management and an extensive study of the endangered Colorado fishes. The State of Utah did not pressure the Fish and Wildlife Service for an earlier opinion, in part due to clear indications that a jeopardy opinion would be issued. At the end, the state agreed to the following mitigating measures: (1) outlet works designed to allow water releases from different reservoir levels to maintain natural water temperatures; (2) specific minimum releases; (3) habitat enhancement; (4) possible propagation and supplemental stocking; (5) development of a reservoir fishery using only native species; and (6) participation in further studies. The possibility of a fish ladder has also been left open.⁶ A re-evaluation of the above requirements is likely once the economics of the oil shale industry bring construction of the dam closer to reality. Further, continuing studies of the endangered fishes have discounted the possibility of the White River as a spawning area, and thereby reduced its importance as habitat.

All of the above problems relate to water withdrawals from the Upper Colorado River Basin, but there are also conflicts in other western river basins.

STAMPEDE DAM AND RESERVOIR

The Washoe Project Act of 1958 authorized \$52M for construction of the Stampede Dam and Reservoir under federal reclamation law. The Act specifically included up to \$2M for measures to permit increased minimum water releases from Lake Tahoe and restoration of the Pyramid Lake Fishery.⁷ The project was constructed prior to final agreement and signing of the repayment contract with the Carson-Truckee Water Conservation District. Subsequent to construction of the project, the Secretary of the Interior determined that the Endangered Species Act required him to operate the Stampede Dam so as to conserve the qui-ui fish and Lahontan cut-throat trout, endangered species. The Secretary further determined that there was no excess water to sell after fulfilling this statutory obligation.

The Carson-Truckee Water Conservation District and Sierra Pacific Power Company sought a declaratory judgement that the Secretary of the Interior violated the Washoe Project Act, and related reclamation laws, in refusing to sell water from Stampede Dam for municipal and industrial use in the Reno and Sparks, Nevada area. While conceding the Secretary has an obligation under the Endangered Species Act, the local interests challenged the extent of that obligation. The Secretary's decision was upheld by a district court and the U.S. Ninth Circuit Court of Appeals. A petition for a writ of certiorari has been denied by the U.S. Supreme Court. The Western States Water Council prepared an amicus brief in that case (*Nevada v. Hodel*), which was signed and filed on behalf of eleven states on February 22, 1985. The issue addressed is "whether the Endangered Species Act requires the Secretary of the Interior to restore endangered species to original population levels by utilizing resources authorized by Congress for reclamation purposes where the intent of the reclamation statute can be achieved without jeopardizing endangered species."

WILDCAT DAM AND RESERVOIR

The Riverside Irrigation District and the Public Service Company of Colorado have proposed a dam and reservoir on Wildcat Creek, a tributary of the South Platte River in Morgan County, Colorado. The developed water would be used for irrigation and for cooling a coal-fired powerplant. After obtaining from the State of Colorado all water rights pertaining to the dam's construction, the District sought

⁶ Fish and Wildlife Service Biological Opinion, dated Feb. 24, 1981, addressed to the Utah State BLM Director.

⁷ Washoe Project Act of 1956, 70 Stat. 7175, as amended, 43 U.S.C. § 614c-614d.

the necessary Section 404 dredge and fill permit (nationwide permit) required under the Clean Water Act.

However, the Corps of Engineers denied the permit because of a Fish and Wildlife Service biological opinion which concluded: "The Wildcat Reservoir is likely to jeopardize continued existence of the whooping crane and adversely modify a 53-mile reach of the Platte River which is critical habitat for the crane."⁸ The critical habitat area is located approximately 250 miles downstream from the proposed reservoir project. The whole basis for the finding of adverse modification of the habitat was that water depletions from Wildcat Creek, and subsequently the North Platte River, would result because of construction of the dam. The irrigation district challenged the Corps decision in court, which has now been upheld by the U.S. Tenth Circuit (*Riverside Irrigation District v. Andrews*).

GRAYROCKS DAM AND RESERVOIR

The Riverside case is but a delayed replay of the controversy surrounding the Grayrocks Dam and Reservoir Project. As part of the Missouri River Basin Power Project, Grayrocks Dam provides cooling water for the 1500-megawatt coal-fired Laramie River Power Station. It also provides irrigation water and recreation benefits. The project was subject to Endangered Species Act limitations under Section 7 due to Rural Electrification Administration (REA) loan guarantees, and again a Corps 404 permit. The Fish and Wildlife Service opposed the project because of the possibility that it and other existing and proposed projects could reduce the flows of the Platte River sufficiently to adversely impact critical habitat of the whooping crane nearly 300 miles downstream in Nebraska.

Short circuiting the then newly approved exemption process, Congress amended the Act to require the Endangered Species Committee, notwithstanding any other provision of law, to consider exemption of the Tellico and the Grayrocks Dams from the requirements of Section 7(a) within 30 days of the date of enactment of the 1978 amendments and render a decision within 90 days of enactment. Otherwise, the projects would be exempted. Congress further directed the relevant federal agencies to require modifications to the Grayrocks Project to "insure that actions authorized, funded, or carried out by them relating to the Missouri Basin Power Project do not jeopardize the continued existence of such endangered species or result in the destruction or adverse modification of habitat of species . . . after consultation as appropriate with the affected States."⁹ The Congress made no reference to recovery or conservation of the species. Rather the only mitigation requirement was that agency actions not jeopardize the species' continued existence.

The final mitigation measures, which were approved by the Endangered Species Committee, were developed independent of the Section 7 consultation process, by parties to litigation involving the project, as part of an Agreement for Settlement and Compromise signed December 4, 1978.¹⁰ Under the settlement, the Missouri Basin Power Project agreed to: (1) limit its maximum water use to 23,250 acre-feet annually; (2) establish a \$7.5 million trust fund for the maintenance and enhancement of the whooping crane's critical habitat along the Platte River (including the purchase of water rights downstream to replace depletions caused by the project); and (3) otherwise restrict operations of the project. Further, the Fish and Wildlife Service noted that it would likely oppose any future depletions on the Platte as a threat to the critical habitat of the whooping crane. The Fish and Wildlife Service's purpose in opposing further depletions was to maintain flood flows which remove underbrush which is used as cover by predators in stalking whooping cranes.

With respect to the Grayrocks Project and the whooping crane, the critical habitat on the Platte River in central Nebraska, as proposed by the Fish and Wildlife Service in 1975, included an area of 2600 square miles—much of which had not had a confirmed whooper sitting in many years.¹¹ Following public protest, the final designation included a three-mile wide strip along the Platte River with a total area of less than 260 square miles. Of note, suitable crane habitat along the Platte shrunk

⁸ Fish and Wildlife Biological Opinion, dated Dec. 20, 1979, addressed to the Corps of Engineers.

⁹ Section 10(i)(1), Public Law 95-632, Amendments to the Endangered Species Act, Nov. 10, 1978.

¹⁰ Endangered Species Committee, application for exemption for Grayrocks Dam and Reservoir, order dated Feb. 7, 1979, signed by Interior Secretary Cecil Andrus. See also 9 Environment Reporter 1418.

¹¹ Winston Harrington, "The Endangered Species Act and the Search for Balance," *Natural Resources Journal*, vol. 21, p. 83.

by over 50% between 1938 and 1976, but during this same period the whooping crane population nearly quadrupled.

This suggests that perhaps the loss of habitat was not that critical after all. Rather, the goal of Section 7 is not simply conservation of endangered species, but preservation of natural ecosystems. The Fish and Wildlife Service, faced with planned depletions on the Platte River which totalled over 40% of the annual flow, some of which might be beyond the jurisdiction of the Endangered Species Act, took a very conservative stance. The major issue inherent in implementation of past endangered species policy has not been whether projects that will eradicate a species will be allowed, but the extent to which activity will be controlled to reduce the risk faced by endangered species.¹² At present, the issue is over responsibility for mitigation and enhancement measures to reduce risks to species status, if any, caused by necessary development.

There are several other examples of past, present and potential conflicts between western water development projects and the conservation of endangered species. Further, conflicts will continue to increase as more species are listed and the demand grows for limited water resources.

PREPARED STATEMENT OF RICHARD M. PARSONS, WILDLIFE COALITION INTERNATIONAL

Mr. Chairman and Members of the Subcommittee, My name is Richard M. Parsons, and I am General Counsel of the Wildlife Coalition International. I would like to express the appreciation of the Board of Directors of the Wildlife Coalition International for this opportunity to present our views on the Endangered Species Act, and in particular to present our case for an amendment to the Endangered Species Act of 1973 to exempt captive-born exotic animals from the Act's requirements.

The Wildlife Coalition International (WCI) is a fairly new organization. It was formed in the summer of 1982 at the request of a number of businessmen and hobbyists, all of whom own, utilize, or otherwise enjoy wildlife and exotic animals. The main goal of WCI is to give its members an effective voice in state, federal and international legislation which affects their right to possess or utilize wildlife and exotic animals. WCI's membership includes Safari Club International, the Wisconsin Bird and Game Breeders Association, the American Fur Resources Institute, the circus Fans of America, the IOWolfers Association, the National Congress of Animal Trainers, the Exotic Bird and Animal Association and the National Buffalo Association. Through the affiliated organizations, WCI represents the views of over 50,000 people nationwide.

Many of our members are involved with the keeping, breeding and displaying of live animals. Many of these people are hobbyists raising such species as llama, game birds and waterfowl. Others are involved through businesses such as small zoos, auction sales, breeders or dealers in exotic wildlife, circuses, animal trainers, and animal exhibitors. We estimate that there are over 20,000 people utilizing wildlife and exotic animals in some form of business. A recent survey of some 80 of these businesses by the publisher of the Animal Finder's Guide documented annual expenditures for feed, medicine, facilities and acquisition of stock of well over \$1,000,000. Even those whose only interest is hobby need to purchase new stock and sell their surplus, much as one of your children might buy a goldfish at the local pet shop.

Although we all recognize that there are people who are cruel to animals and who ignore conservation, the members of WCI are responsible people who care about the animals that they raise and are concerned about the conservation of the species which these animals represents. WCI members, whether they are animal breeders, hunters, trappers, exhibitors, or animal trainers are highly knowledgeable in the nature, behavior and needs of wildlife and exotic animals because they are deeply involved with the wildlife in a way that the average person never can be. Their information about and feeling for animals comes from a deep involvement with and observation of the real world of animals, in contrast to most people who only know animals from television shows, a public or private zoo, and perhaps from noticing occasional squirrels, pigeons and robins.

As a result of the unique knowledge and involvement with animals that our members have, we are fully supportive of the goals of the Endangered Species Act, and encourage the Subcommittee to report favorably on H.R. 1027, so that the Act may continue to be implemented. In fact we support increases in the authorized appro-

¹² *Ibid.*

priations which will be used to fund habitat acquisition, research, and management of the species.

What we do not support is the continuation of aspects of the Act which serve no useful purpose for the conservation of endangered species and which, in our view, actually hinder conservation. We are speaking of the restrictions on the sale and transportation of captive-born animals. Our views grow out of three beliefs:

(1) We believe that the unfettered captive breeding of animals can contribute to their conservation in the wild;

(2) We believe that the use and display of live animals is an important element of the education of the public, and that such education cannot be fulfilled simply by television and municipal zoos; and

(3) We believe that government has no business regulating activity which does not directly and immediately relate to the legitimate Constitutional purposes which are the basis of the Endangered Species Act.

Do not mistake us, gentlemen. We believe in the conservation of the species and the prevention of extinction. Perhaps more than most, because we appreciate, through direct knowledge, the awe and wonder of wild animals. But we are not just spouting rhetoric when we talk about Constitutional principles. When we first raised our concerns about the Act, we were told that some would object to changing the law, and that that was a reason not to push forward. We were told that there were many other more important things to deal with than our small problems. And we were told that the only way to protect endangered species is to regulate, control, count and document all activities with such animals, whether wild or captive. Our answer to all of these pieces of advice is "hogwash!" Our Constitution was purposely written as a document of limited powers. The laws passed pursuant to that Constitution must likewise be limited to only that which is necessary to achieve the legitimate goals of those laws.

Our proposal is to add a new subsection to section 9 of the Act which states: "The prohibitions in subsection (a) of this section shall not apply to any activity in interstate commerce which involves a specimen of fish or wildlife born in captivity and which does not normally occur, in terms of its current distribution, within the United States; Nor shall the prohibitions apply to the importation of specimens of the Asian elephant (*Elphas maximus*) for which a permit has been issued by the country of origin or export pursuant to the Convention."

The need for the exemption arises because, for many years now, the Act has been consistently construed to cover captive as well as wild specimens. It does not matter whether the specimens were born in captivity. As long as the species itself is listed, every specimen belonging to that scientifically-described category is covered by the Act.

The only way for a captive specimen to be exempted is for the listing to specify that only wild specimens are considered members of the listed species. While this is convenient in theory, it can be very inconvenient in practice. For one thing, it is a misuse of the scientific notation for the species. It can also lead to listings which are confusing both to enforcement officers as well as to the public. Thirdly, the Act has also been consistently construed by the Department of the Interior to require a separate and complete rulemaking for each such change, or at least a separate series of justifications under the criteria of Section 4 of the Act for each species included in a "group" amendment.

In 1979, the Service partially dealt with this problem, within the limits of its authority. The Service issued regulations defining a "relaxed" system of controls for captive-born specimens of endangered species not native to the United States. This has become known as the Captive-Bred Wildlife (CBW) system. Prior to CBW, a separate permit had to be obtained for each purchase or sale of an endangered species in interstate commerce. The public zoos, among others, had complained both to the Service and to Congress that the delays, paperwork and additional costs inherent in this type of requirement were so serious that they had effectively stopped the normal transfers of endangered species for breeding purposes. As a result, the "free-market" breeding activities of endangered species had come to a virtual halt.

The Service's regulation was based on an interpretation of the Act that a separate permit was not required for each transaction. The Service felt that it was sufficient if a series of transactions over a period of time were the subject of a "blanket" type of permit. The Service also based its regulation on a policy decision that although the Act, as written, required the regulation of captive specimens, this regulation should be minimal (see 44 FR 54002, September 17, 1979), because the real purpose of this Act was to conserve wild populations of endangered species, and the connection between wild populations and captive populations was very limited.

I was Chief of the office in the Service which authored the CBW system. I can affirm that it was the Service's intent to "deregulate" the field of captive endangered species to the extent allowed by law. In 1981-1982, as a member of the Service's task force on possible amendments to the Act, I raised the issue of fulfilling this intent by seeking an exemption for captive specimens. The Service, and the Department of the Interior, did not present this issue to the Congress in 1982 because there were more important matters to be dealt with, and because to their knowledge, no particular group was vocally requesting such a change.

Now there is a group which is requesting the change—WCI. WCI represents breeders and exhibitors of endangered felines, circuses and entertainers utilizing captive-born endangered species, and small zoos which breed and exhibit endangered species of all types. Unlike the major zoos, our members, who are primarily small businesses and individual entrepreneurs, do not have the staff to keep up with the paperwork for permit applications and record-keeping required under even the "deregulated environment" of the CBW system. Therefore, we would like to see further deregulation as a matter of the economics of our businesses.

Even if it were not a matter of economics, however, we would still favor an exemption for captive-born exotic specimens on the grounds of principle. The original version of the Act took the approach, "if in doubt, regulate." The Act was extremely broad and extremely strict. The Service has spent much of the eleven years since passage of the Act "backing off," within the limits of what it could do by regulation, to make the Act realistic, enforceable, and supportable. Congress has done much the same thing, but has focused its attention, for the most part, on some of the major aspects of the Act, such as listing procedures, section 7 considerations and critical habitat designations.

This broad coverage by the Act is unduly and without good cause restricting the freedom of our members to own, utilize and enjoy wildlife. The activities of our members do not contribute to the decline of wild populations of such species. In fact, we believe strongly that our activities may do more than all the efforts of the state and federal governments to instill a "grass roots" appreciation of the species, knowledge of their needs, and concern for their conservation. We also provide, through captive breeding, many of the animals used by the major zoos and other institutions. This increases the available captive gene pool and reduces demand for specimens from the wild. Thirdly, our buying and selling activity, both through private transactions and through the several exotic animal auctions, is an important part of the market which relieves the strains of surplus populations and provides new specimens, and new blood, throughout the community. I have attached a letter from a member of our Board of Directors, Mr. John F. Cuneo, Jr. Mr. Cuneo has many years of experience with tigers and Asian elephants. His letter also discusses the situation with the import restrictions which inhibit the propagation of Asian elephants in their native lands.

For all these reasons, we ask the Subcommittee to seriously consider our request. We will be available to the Subcommittee and its staff to answer questions and assist as we may. Thank you again for the opportunity to present our views.

Attachment.

THE HAWTHORN CORPORATION,
WORLD OF ANIMALS,
March 25, 1985.

Mr. RICHARD PARSONS,
WCI,
Reston, VA.

DEAR MR. PARSONS: I am writing this letter in the hope that it can help you in your presentation to the congressional hearings in Washington.

The endangered species law, as it is presently written and enforced, is doing great damage to the breeding programs, particularly of tigers. The restriction of not being able to sell the surplus baby tigers except to those who already have permits to own tigers, while it looks sensible, has proved a disaster. It is sort of like restricting the sale of food in restaurants only to those who have eaten. In order to develop a wider gene pool, we need to encourage new breeders and this regulation not only discourages them, but prevents them.

The information put out by the Zoo Association is totally false as there are many more tigers owned by private individuals than are owned by zoos and the Zoo Association does not even consider these as existing. I myself own approximately 50 tigers. Ringling Bros. Circus probably has 40 and other private breeders have as many as 30 or 40 each. Most zoos only have 2 or 4 tigers. Again, it is similar to the census bureau taking the figures of the Catholic Church as the total population of America, disregarding all others. We and all other private breeders have had to cur-

tail our breeding program due to the restriction on sales. The zoos have not only curtailed their breeding program, but basically stopped it using various surgical and chemical means to prevent breeding of their tigers. I cannot believe that this should be the aim of the endangered species program—that is the curtailing of the breeding of the endangered species.

In my opinion, the buying and selling of captive bred, non-native animals should be without restriction and as far as this causing the capture of animals in the wild, this will not happen as it is cheaper and easier to raise these animals and we basically get better quality animals than if we import wild caught animals. The U.S. Customs can tell if tigers are being brought in and only in the case of import should we need permits.

Also, the Interior Department should stop concerning itself with the care of these animals and the certification of facilities as this only makes for added costs for the government as the Agriculture Department does this in their inspections. The turning loose of the internal trade in endangered and threatened species would in no way affect those in the wild but would make life much easier for breeders; would help propagation of these animals; and, would save the government the cost of issuing these permits, and a lot of payroll would be saved in the Interior Department.

ASIAN ELEPHANTS

Asian elephants are the real victims of the bureaucratic system. Asian elephants are, for the most part, domestic animals. They are owned and worked by the lumber companies in the Far East. Their numbers have been decimated by war and also by the change of the lumber companies from elephant power to tractors. The lumber company having a hundred elephants would work these elephants all year, except during the Monsoon Season, at which time the elephants were turned loose in the forest to breed. Since elephants live for so many years, the lumber company could not retain all of the offspring, only a small number for replacement. The rest were sold on the world market which gave the lumber company additional income and a reason to breed Asian elephants.

The international restriction on the buying and selling of Asian elephants has actually worked like a conspiracy to prevent the breeding of Asian elephants. Like the tiger, the Asian elephant is an expensive animal to feed and no one is going to raise them without the possibility of sale.

Almost all Asian elephants are branded and one of the best ways to increase the number would be to encourage the international sale of captive-born Asian elephants. This would make a market for the young elephants, and, at the high price they sell for today, would see that every female elephant in Asia would be bred constantly. There would be no better way to stimulate the breeding of the animals.

Hoping the above can be of some help to you.

Very truly yours,

JOHN F. CUNEO, Jr.

PREPARED STATEMENT OF THE WILDLIFE LEGISLATIVE FUND OF AMERICA

The Wildlife Legislative Fund of America is a non-profit organization which protects the heritage of American sportsmen to hunt, fish and trap and protects scientific wildlife management practices by providing legislative lobbying and legal defense services. It is an association of sportsmen's and other conservation organizations at the national, state and local levels. These range from Ducks Unlimited, whose members raise and spend over \$40 million annually to acquire and maintain North American waterfowl habitat, to local rod and gun clubs. Through these organizations, WLFA represents the interests of an aggregate membership of over 750,000 conservation-minded Americans.

The Wildlife Legislative Fund supports reauthorization of the Endangered Species Act.

Sportsmen support the protection of wildlife and plants whose survival is threatened. This is in keeping with their long history of concern and activism in conservation. In the early part of this century, hunters, fishermen and trappers were the first to call for the establishment of government and private sector programs to protect wildlife from what continues to be its greatest threat—habitat degradation and loss. When necessary, sportsmen have been the first to call for restrictions—even outright bans—on the taking of traditional game species.

The nation's sportsmen today continue their tradition of activism in protecting endangered wildlife. Their annual cash outlay, in the form of hunting, fishing and trapping license fees and excise taxes they bear on the sale of outdoors equipment,

tops \$500 million to pay for programs to enhance game, non-game and endangered species populations. In the private sector, organizations like Ducks Unlimited, Foundation for North American Wild Sheep, The Ruffed Grouse Society, The National Wild Turkey Federation, Mzuri Wildlife Foundation and thousands of others have raised and spent hundreds of millions, if not billions, of dollars on conservation programs to further wildlife abundance and to protect wildlife species in the United States.

In its 1980 study, done in conjunction with the U.S. Bureau of the Census, the U.S. Fish and Wildlife Service reported that some 73 million Americans are annually active in hunting, fishing and trapping. These sportsmen are wholeheartedly behind the concept and practice of endangered species protection.

As Congress continues to focus on reauthorization of the Act, various interests will no doubt suggest ways to fine-tune the law so that it operates more effectively. One aspect that concerns sportsmen has to do with state wildlife agencies' abilities to properly manage species identified in the law as "threatened". Traditionally, state wildlife agencies have been permitted to allow tightly regulated harvest of certain threatened species in those areas in which population levels were sufficient to allow limited taking. A recent U.S. Court of Appeals ruling on gray wolves in Minnesota challenges the states' authority to permit these harvests. Other species for which the ruling may have ramifications include stable populations of grizzly bears in Montana and other states and American alligators in Louisiana, Florida, Texas and elsewhere.

Biologists maintain that limited harvest of these species can be a beneficial management tool. It can provide biologists with scientific data useful in planning other management programs, can help to build good landowner relations with conservationists and can help to keep certain species from becoming habituated to man, thus reducing chances for conflicts with humans.

On balance, however, the Endangered Species Act is working well. We encourage its reauthorization.

**PREPARED STATEMENT OF LONNIE L. WILLIAMSON, SECRETARY, WILDLIFE
MANAGEMENT INSTITUTE**

Mr. Chairman, I am Lonnie L. Williamson, secretary of the Wildlife Management Institute, which is headquartered in Washington, D.C. Initiated in 1911, the Institute's program is dedicated solely to the improved management of renewable natural resources.

The Institute is pleased to have been involved in developing the Endangered Species Act, and in supporting it since enactment. We continue to believe that the program is an important segment of our national wildlife conservation effort. Therefore, we endorse the purposes of H.R. 1027, and urge that the subcommittee expedite reauthorization of the Act. However, we urge the subcommittee to take notice of two recent court decisions that unduly restrict the authority of the U.S. Fish and Wildlife Service and state wildlife agencies.

On February 19, 1985, the U.S. Eighth Circuit Court of Appeals prohibited the Interior Department and the Minnesota Department of Natural Resources from implementing a management plan for wolves in the northern part of that state. The plan called for trapping excess wolves in certain areas to control livestock depredation and relieve other concerns of landowners and other residents bordering the wolf's range. Although the Endangered Species Act supposedly gives the Interior Secretary authority to allow such limited taking of a threatened species, the Court ruled otherwise. According to observers, this decision may soon be applied to the taking of grizzly bear for similar purposes in Montana. Furthermore, it seems reasonable that the decision could just as easily be used by preservationists groups to stop the taking of alligators in the southeastern U.S.

We suggest that the Subcommittee seriously consider an amendment to the Act to overcome this apparent misinterpretation of the law by the Eighth Circuit.

Another U.S. Eighth Circuit Court of Appeals decision in early January of this year states that Indians may kill endangered species and any other wildlife they choose on reservation lands. This ruling is either a blatant disregard for endangered wildlife by the Court, or a clear signal that the Endangered Species Act is inadequate.

The U.S. Fish and Wildlife Service arrested a number of Indians last year for killing more than 200 bald eagles in South Dakota and Nebraska. The defendants also were charged with selling parts of the birds as native American artifacts.

A federal court convicted the Indians of the taking and selling charges. Four of the Indians subsequently appealed their conviction to the Eighth Circuit which reversed part of the lower court's decision.

By a 5-3 vote, the appeals court said that the Indians have treaty rights to hunt on reservations as they please. This, the court said, includes the right to kill endangered species or any other form of wildlife. However, the court said, Indians do not have the right to sell any parts of the animals, thus the lower court's conviction for selling the artifacts will stand. The appeals court indicated that the only way to stop Indians from killing endangered species or other wildlife at will is to amend the applicable treaties to that effect.

The outdated treaties that this country signed with various Indian tribes years ago have become a serious threat to fish and wildlife resources in many parts of the nation. The Subcommittee, I am sure, is well aware of the problem. Although it surely is a sensitive area to broach, something must be done. And we believe that the current endangered species debacle is a good place to start. Therefore, we recommend that the Subcommittee consider an amendment to the Act that would allow state and federal wildlife agencies to prohibit Indians from taking endangered or threatened species.

Mr. Chairman, these two court decisions not only restrict managers' ability to conserve endangered species, they breed contempt for the law among the general populous that under reasonable circumstances would support it. We hope that the Subcommittee will help solve these issues. And we appreciate the opportunity to express our views on this subject.

GEORGE MIKSCH SUTTON
 AVIAN RESEARCH CENTER, INC.

P.O. Box 2007
 Bartlesville, OK. 74005-2007

Phone 918-336-7778

10 March 1985

The Honorable John Breaux
 Chairman, Subcommittee on Fisheries and Wildlife
 H2-544 House Annex II
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Sir:

I am writing with regard to House Bill 1027 which is to be discussed at hearings on March 14, 1985. Unfortunately my scheduled field work has not allowed me to write sooner. Today I spoke with your general counsel, Mr. Jeff Curtis, and he assured me that the comment period on this matter would extend 30 days beyond the date of the hearings.

As director of a research center dedicated toward saving and reestablishing endangered species of birds, such as the bald eagle, I would like to suggest that the reauthorization of the Endangered Species Act occur just as it is and without the deletion of the amendment in question.

Deletion of the amendment would make it all but impossible for many restoration programs to function. We simply cannot publish in the Federal Register prior to every move we make with captive produced progeny of endangered species because we do not even know how many young we will have to release at the time of publication. Obviously there are a myriad of complications associated with this dilemma.

I hope that you and other members of the Subcommittee on Fisheries and Wildlife will have the opportunity to listen closely to the testimony presented by The Peregrine Fund. This testimony is, I believe, supported by facts.

Thank you for your consideration.

Respectfully yours,

Steve K. Sherrod
 Steve K. Sherrod, Ph.D.
 Director

SKS/lis

15093 Faust Blvd.
 Detroit, Mi. 48223
 March 12, 1985

Subcommittee on Fisheries, Wildlife Conservation
 and the Environment
 United States House of Representatives
 Washington, D. C. 20515

Dear Committee Members:

The Michigan Cactus & Succulent Society wishes to submit a statement to your hearing on the reauthorization of the Endangered Species Act on March 14, 1985.

For almost ten years now, our Society has actively supported programs for the protection of endangered and threatened species of plants. Indeed, we have a representative appointed to Michigan's Department of Natural Resources citizens advisory committee. We have also supported vigorously protection measures of the federal government, recognizing that the cacti family is the most endangered of all plant families. Over collecting is one of the causes. We know this first hand; we strongly oppose collecting from the wild; and we prohibit the entry of collected plants in any of our shows.

Since 1975 we have testified before Congress that the Endangered Species Act should be amended to prohibit taking of plants. We have said from first hand knowledge, the fields are being ravaged. We are enclosing an excerpt of our testimony to the Fish and Wildlife Service dated 1976 which contains a full discussion of the reasons why the taking of listed plants should be prohibited. Please note that under Michigan law the taking or destroying of state listed plants is indeed prohibited.

Even at this late date, we respectfully ask that this defect in the federal law be rectified. We will also be sending a copy of this letter to our Michigan Congressman, John D. Dingell, the author of the 1973 act.

Sincerely yours,

Kathleen Thomson

Kathleen Kepner Thomson
 Conservation Chairman
 MICHIGAN CACTUS & SUCCULENT SOCIETY

cc: John D. Dingell
 Enclosure 1

THE DETROIT CACTUS AND SUCCULENT SOCIETY

August 4, 1976

LETTER OF TRANSMITTAL

Honorable Lynn A. Greenwalt, Director
 U.S. Fish and Wildlife Service
 P. O. Box 19193
 Washington, D.C. 20036

Dear Mr. Greenwalt:

The Detroit Cactus and Succulent Society appreciates the opportunity to transmit a comment to the proposed rules "General Permit Procedures and Endangered and Threatened Wildlife and Plants" published in the Federal Register, June 7, 1976

Our comment is organized into two parts: Part I - The Proposed Rules Viewed Within the Context of General Policy, and Part II - Abbreviated Comments to Selected Sections of the Proposed Rules. This presentation format was selected as the best method to comment to the proposed rules at a time when the basic enabling act, the Endangered Species Act of 1973, is undergoing review. We fully appreciate that there are certain weaknesses in the act and that these are reflected to some extent in the proposed rules.

The members of the Detroit Society have a strong interest in a meaningful and effective program affording protection to endangered and threatened species. Therefore, we hope that our comments will contribute toward achieving that end.

Sincerely yours,

Kathleen Kepner, Conservation Chairman
 203 North Shore Drive
 St. Clair Shores, Michigan 48080

KK/rs
 Enclosure

PART I

THE PROPOSED RULES VIEWED WITHIN THE CONTEXT OF GENERAL POLICY

The taking of Endangered and Threatened Plant Species Should Be Prohibited

A serious omission in the Endangered Species Act of 1973, Public Law 93-203, is that the taking of endangered and threatened plant species is not defined as a prohibited activity. Because administrative rules cannot exceed statutory authority, control of "taking" falls outside the scope of the proposed rules. Certain weaknesses in the proposed rules derive from this circumstance.

In his initial proposal in 1973 (House Bill 37) Congressman John D. Dingell provided for language that would prohibit the taking:

Section 3 (6) "The term 'take' means... (B) with respect to flora, to collect, sever, remove, or otherwise damage in any manner, or to attempt to collect, sever, remove, or otherwise damage in any manner."

We agree with Congressman Dingell and would support the incorporation of this language into the basic law. It is a matter of history now that the Congress felt that they should secure scientific information from the Smithsonian Institution prior to considering further legislative action on the protection of plant species. Deficiencies in the law with respect to plants were clearly spelled out in the testimony of Mr. T. Destry Jarvis, administrative assistant, National Parks and Conservation Association before a congressional hearing, October 1, 1975.¹

There is ample precedent for prohibiting the taking of endangered and threatened plant species. Some of the states have already approved such measures. For example, the Michigan Endangered Species Act of 1974, Public Act No. 203 provides: "'Take' means, in reference to plants, to collect, pick, cut, dig up, or destroy in any manner."

We believe that great harm can result if the taking of endangered and threatened plant species is not prohibited by law. The most alarming aspect is that the location, the critical habitat, can be revealed in the listing process provided by the proposed rules. Once revealed these plants can become "sitting ducks". Indeed listing might actually assure the extinction of those rare plants which have limited range.

The Endangered Flora Project, Smithsonian Institution has been carefully compiling comprehensive scientific data with regard to the identification of endangered and threatened plant species and their habitats. In our opinion, it is simply unthinkable at the present time to provide access to the detailed data. And yet how can plant populations be monitored (as recommended by the Smithsonian Report) if specific habitat cannot be revealed?

The absence of controls on the taking can also inhibit scientific inquiry. In accordance with the International Rules of Nomenclature, taxonomists identify rather precisely the location of the species of plant being described. The ravage of the field has reached such levels, that some taxonomists are reluctant to reveal the location of the species for fear of exposing the plants to predation.

Common sense tells us that an ounce of prevention is worth a pound of cure. Prohibition of the sale of an endangered or threatened species is not prevention; prohibition of its taking is.

Plants Are Not the Same as Animals and Therefore Should be Treated Differently In Recognition of Substantial Differences

From the proposed rules, it appears that regulations pertaining to plants have been squeezed into the general configuration of the rules applying to endangered and threatened animal species. Uniformity of rule simplifies administration when such rules are applied to like objects. But unnecessary complications and malfunctioning can arise out of applying a uniform rule to dissimilarities.

¹Hearings before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, October 1, 2, 6, 1975, Serial No. 94-17, P. 222 ff.



FOUNDED 1897
SUITE 300
1920 N STREET NW
WASHINGTON
DC 20036
202/861-2800
TWA 710-822-0126

Officers

Chairman:
Ralph E. Bailey

*Vice Chairman and Chairman,
Finance Committee:*
Harry M. Conger

Vice Chairmen:
Charles F. Barber
George B. Munroe
Pierre Gousseland
Robert H. Quenon
Walter E. Ousterman, Jr.
Richard A. Lenon
Samuel K. Scovill
Thomas D. Barrow

President:
J. Allen Overton, Jr.

Secretary and Treasurer:
Henry I. Dvorshak

Directors

George B. Munroe, New York
P. Malozemoff, New York
Charles F. Barber, New York *
Otis Bennett, Jr., Cleveland
Robert W. Hutton, Greenwich
Richard A. Lenon, Northbrook IL
Ralph E. Bailey, Wilmington
Samuel K. Scovill, Cleveland
Thomas A. Holmes, Woodcliff Lake NJ
Pierre Gousseland, Greenwich
A.M. Wilson, San Francisco
Robert H. Quenon, St. Louis
Ralph F. Cox, Denver
Thomas D. Barrow, Houston
Frank A. McPherson, Oklahoma City
W.A. Griffith, Wallace ID
Robert F. Anderson, Cleveland
Calvin A. Campbell, Jr., Chicago
Harry M. Conger, San Francisco
Robert M. McCann, Bethlehem
Richard G. Miller, Jr., Chicago
Walter E. Ousterman, Jr., Oakland
R.J. Gary, Dallas
Frank V. McMillen, Danbury
Lord Clitheroe, London
Kenneth J. Barr, Englewood CO
A.W. Calder, Pittsburgh
Gino P. Giusti, Stamford
Ralph L. Hennebach, New York
William G. Kegel, Indiana PA
John A. Wright, Clayton MO
Robert McInnes, Cleveland
Douglas J. Bourne, Houston
W. J. Conway, Los Angeles
Raymond M. Ingram, Houston
James R. Voisard, Dallas
Milton H. Ward, New York
Renold D. Thompson, Cleveland
Ian MacGregor, Greenwich †
N.T. Camica, Greenwich †

* Immediate Past Chairman
† Honorary

March 14, 1985

The Honorable John B. Breaux
Chairman
Subcommittee on Fisheries & Wildlife Conservation
& the Environment
Committee on Merchant Marine & Fisheries
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The opportunity you and your Subcommittee have provided the American Mining Congress to comment on the reauthorization of the Endangered Species Act (ESA) is most appreciated, and I would ask that these comments be made part of the hearing record.

The American Mining Congress is an industry association that encompasses: (1) producers of most of America's metals, coal and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry.

Our primary goal is to focus on ways to make the Endangered Species Act more workable in its practical applications. To this end, much should be able to be accomplished through regulatory and administrative processes, without major legislative amendments to the statute.

We bring to the attention of the Committee the fact that the Fish and Wildlife Service has not issued regulations reflecting major amendments in the 1982 reauthorization.

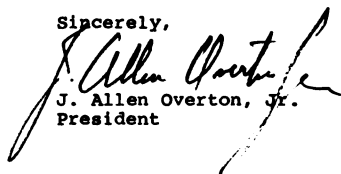
Section 7 regulations have not been issued nor have regulations on incidental taking been promulgated. Exemption process regulations were published on the last day of last month. Experimental population rules have been published so recently that only one non-essential population has been established. In the case of the latter two rules, the recency of publication and lack of experience under the rules precludes the judgment of their workability and the subsequent need for corrective legislative amendments.

The issues described above concern amendments that user groups supported in the 1982 reauthorization. To be denied the use of the 1982 amendments because of lack of implementing regulations leads to the question of whether these regulations will be issued during the ensuing reauthorization period if it is another three years. We propose that the reauthorization be limited to a two-year period to encourage the Fish and Wildlife Service to promptly promulgate the regulations.

We understand that the subject of endangered and threatened plants on private land may be a reauthorization issue. We strongly urge that this issue not be pursued during the reauthorization exercise. It is a highly controversial and volatile subject and would involve extensive research and concomitant changes in numerous laws.

Please allow us the opportunity to answer questions you may have concerning this statement.

Sincerely,



J. Allen Overton, Jr.
President

TO: The Honorable Members of the Subcommittee on Fisheries and
Wildlife Conservation

FROM: Charles M. Haynes, Wildlife Research Biologist, Colorado
Division of Wildlife, Fort Collins, CO 80521

SUBJECT: Reauthorization hearings for the Endangered Species Act
(ESA), 14 March, 1985.

In lieu of the opportunity to testify before the subcommittee evaluating the reauthorization of the ESA, I wish to submit this statement as a professional wildlife research biologist and United States citizen. I feel that it is important in my statement to provide some needed long-term perspective relative to the meaningfulness of this most important act both to the United States and to other nations who look to us as a model for humane behavior.

The question before this subcommittee is the reauthorization of the ESA and, importantly, the stipulations of the Act. Certain perspectives are important to this most critical process.

Human civilization may be conveniently marked in terms of "ages" as we record our progress through history. Our species marched, with a constantly accelerating pace, through ages of "stone", "iron", and "bronze" in the wink of an historical eye. We passed through the superstitions of the "dark ages" into the light of "reason" and

"enlightenment". Not all cultures have marched along stride for stride with us as we know; however, we of the United States have greatly transcended the fears and insecurity associated with predatory eyes beyond the firelight to enter ages undreamed of by our earliest forebearers. We have entered an "age of technology" in which discussions of intelligent machines are serious ones. Our children's star fantasies are not out of line with possibility. But, it is important to understand, that we have also entered a less-complimentary age...an "Age of Mass Extinction".

Conservative estimates by some of our nation's most respected scientists indicate that a staggering loss of life forms is certain worldwide in the next two decades. Perhaps one in five species now living will become extinct. Such losses, in terms of potential human benefit gained and dignity earned will be unprecedented. Since most extinctions are expected to occur in the tropics, the role which the United States can play is limited. Our role as an intellectual and moral model, however, may be in the long-run, pivotal. The reauthorization of a strong ESA signals to other societies our position on this issue. It provides a needed model for their policies--policies which unquestionably feed back to influence the well-being of our own nation. As the tropics go, so ultimately will we.

The United States has its own declining species that deserve our care and humane duty. A strong ESA is the vehicle for both diagnostic and corrective action. The Act has been acknowledged as a cornerstone of an enlightened and compassionate society...and rightfully so. As a professional wildlife research biologist and United States Citizen, I strongly urge that a biologically meaningful ESA be retained and that

we dispense with the necessity to dissect it annually. Is it truly necessary to subject this societal cornerstone to yearly biopolitical scrutiny?

Further, I strongly oppose the exclusion of any species or group of species from the protection offered by the ESA strictly to placate select development interests. This would be an admission that we do not care to work hard enough to fulfill our obligations to forms of life that, as a result of our negligence, have in fact become endangered. Further, such exclusions would dilute the ESA to a point of meaninglessness and also diminish our role as a model for other nations.

In closing, I request that this statement be inserted into the Record of these hearings. Thank you.

Charles M. Haynes

NWRA



JOHN M. SAYRE, President (Denver, Colorado) WAYNE CUNNINGHAM, Treasurer (Las Cruces, New Mexico)
 JEFFREY L. NELSON, Vice President (Madison, South Dakota) GEORGE PROCTOR, Immediate Past President (Klamath Falls, Oregon)
 J.W. (PAT) O'MEARA, Executive Vice President
 LITSA DECK, Executive Assistant

955 L'ENFANT PLAZA, S.W., SUITE 1202
 WASHINGTON, D.C. 20024-2170
 (202) 488-0610

March 15, 1985

OTHER DIRECTORS:

J. A. (Ted) Riggins, Jr.
 Phoenix, AZ
 Raymond R. Rummonds
 Coachella, CA
 Robert T. Chuck
 Honolulu, HI
 John A. Rosholt
 Twin Falls, ID
 D. Keith Williams
 Billings, MT
 Homer Loutzenheiser
 North Platte, NE
 Dale Schultke
 Reno, NV
 Vern Fahy
 Bismarck, ND
 R. G. Johnson
 Clinton, OK
 John H. Specht
 Seguin, TX
 Lynn S. Ludlow
 Orem, UT
 James W. Trull
 Sunnyside, WA
 Merl Rissler
 Casper, WY
 Linus Tumbleson
 Commercial & Industrial
 James W. Ziglar
 Financial
 Harry Griffen
 Municipal

The Honorable John Breaux
 Chairman
 Subcommittee on Fisheries &
 Wildlife Conservation
 Committee on Merchant Marine and
 Fisheries
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Mr. Breaux:

At the most recent national convention of the National Water Resources Association, held in Phoenix in November 1984, the following resolution was adopted by the delegates:

Resolution 84-12

1. That Congress take immediate steps to:

a. Amend the Endangered Species Act of 1973, as amended, to provide in the application thereof for a balance between human requirements and the species of wildlife allegedly endangered;

b. Amend the law to prohibit use of the Act to impair, supersede, or abrogate the development of rights to water, water and power projects, and reservoir sites obtained under state law and Interstate Compacts;

c. Amend the law to clearly support maintaining endangered species through artificial propagation and other non-flow management alternatives;

d. Amend the law to more clearly describe the relationship of Section 7 consultation with the development of recovery plans and the denomination of areas of critical habitat;

NATIONAL WATER RESOURCES ASSOCIATION

e. Amend the law to require a detailed decision document containing all data and scientific analysis concerning the designation of species or subspecies, habitat or finding of jeopardy from a proposed project or action; or

f. Amend the law to prohibit protection of subspecies; or

g. Repeal the law.

2. That the Department of Interior, when petitioned by an affected state legislature or governor, take immediate steps to review, document, reconsider and, where appropriate, rescind its previous action in its administration of the Endangered Species Act of 1973. Such action should include public hearings in each state's affected area.

Our position statement on this resolution is as follows:

In 1973, the United States Congress, after consideration of the endangerment of a variety of the larger mammals of the world, including the African elephant, the timber wolf, the grizzly bear, and such animals which are important natural resources deserving of man's admiration and protection, passed into law the Endangered Species Act of 1973 (87 Stat. 884).

The Fish and Wildlife Service of the Department of the Interior has determined a variety of species of wildlife to be endangered. The Administration of the law by the Service has been exceedingly biased, and the alleged endangerment of a variety of unimportant and inconsequential species has been utilized as a means and method of precluding or impeding worthwhile resource development. These determinations have put nonhuman species above the human species.

The Service, as one means of recovery, usually proposes the artificial planting, stocking, or reintroduction of endangered species into habitat areas in which such species were purportedly present at some time prior to the utilization of the areas and its resources for human purposes or into areas in which the numbers of such species are declining. The mere purported presence of an endangered species in an area can impede development, and the artificial planting, stocking, or reintroduction of a species is, at best, a marginal endeavor, the purpose of which becomes highly suspect. At the same time, responsible artificial propagation efforts could be an effective means to avoid water flow requirements which would interfere with State water laws and compact entitlements.

The Service is proposing flow maintenance requirements in the Colorado River Basin which may interfere with development of compact allocations by states signatory to the Colorado River Compact. A similar effort by the Service is apparently underway

in the South Platte River Basin, which would affect states signatory to the South Platte River Compact. The target flows will apparently be maintained through conditions imposed on Federal permits and regulatory approvals, rather than the Federal Government acquiring water rights in an appropriate manner in accordance with methods outlined by the United States Supreme Court in California v. United States, 438 U.S. 645 (1978).

The amendments to the law adopted by Congress in 1978 were for the purpose of rendering the law more workable for the original purposes intended, and to achieve a balance in the application thereof; however, the law as yet administered, and as it is being utilized, is still a means to preclude or impede resources development, and will continue to be so abused unless and until amended by Congress and reasonably interpreted by the Executive Branch. The Service should be instructed immediately that Solicitor Coldiron's opinion of September 11, 1981, holding that Federal non-reserved water rights do not exist, means that the United States must proceed under Section 5 of the Endangered Species Act to acquire water within state law systems, if it wishes to provide water for purposes under the Endangered Species Act.

Insufficient data, scientific analysis, or even organization of the data has often characterized decisions by Federal Agencies concerning designation of species as endangered, identification of critical habitat, or impact of proposed projects upon the species or habitat area. Worthwhile projects have been significantly delayed, made more costly, or entirely prohibited, yet subsequent examination of the data and rationale for the government agency decisions has found insufficient basis for the agency decision. Recent experience with the snail darter, the squawfish, the whooping crane and the least tern illustrate the need for better data base development and decision making.

Decisions concerning designation of a species as endangered, or a habitat as critical, or that a project will likely adversely impact survival of the species must be firmly proven and based on reasonable data and scientific evidence. Such data and decisions should be documented in a detailed decision document with the evidence collected, analyzed and decision justified.

We ask that the resolution be made a part of the record of the March 14, 1985 hearings on amendments to the Endangered Species Act.

Sincerely yours,


J.W. O'Meara
Executive Vice President

March 16, 1985

The Honorable John Breaux, Chairman
 Sub-Committee on Fisheries, Wildlife
 Conservation and the Environment
 U. S. House of Representatives
 Washington, D.C. 20515

Dear Representative Breaux:

The Virginia Wildflower Preservation Society (VWPS), a non-profit citizens' organization representing more than 500 members throughout the Commonwealth, supports reauthorization of a strong Endangered Species Act. We urge strengthening of the Act in several ways to increase its protection of endangered and threatened species, particularly plants.

1. Increase legal protection for listed plant species

Under current law, plants belonging to species listed as endangered or threatened receive very little protection unless they are on federal land. Plants on private or state land are not protected from collecting, whatever the motive.

This is a serious problem in Virginia where both our listed plant species -- the Virginia round-leaf birch (*Betula uber*) and small whorled pogonia (*Isotria medeoloides*) -- have important populations on private land and have been subject to collecting in the past. The Virginia round-leaf birch is an extremely rare tree found only in Smyth County, Virginia. When rediscovered in 1975, there were 14 adult trees and 26 seedlings and saplings. The tree was listed as endangered in 1978; a year later it was noticed that collecting of cuttings as part of attempts to propagate the species had damaged some of the older trees. By 1984, the species population had declined to four adults and about 30 seedlings. That spring, 18 of those seedlings were stolen or destroyed, thus reducing the species' chances of survival and laying waste to the efforts of federal and state agencies, university scientists, and the Nature Conservancy.

The small whorled pogonia is a rare orchid found in woodlands from Ontario to Georgia. Virginia has three populations of this species, which was listed as endangered in 1982. The James City County site contains 73 plants; it is the largest population outside New England. Unfortunately, it is on private land. Collecting is a clear threat to the species. Because it is so rare, botanists are tempted to obtain one from any population that they discover in order to document their having found it.

Private efforts are being made by the landowners and The Nature Conservancy to ensure survival of both these plants. Their efforts need the backup of federal prohibition on collecting, no matter where the plants are located.

In addition, listed plant species, even those on federal lands, are not protected against vandalism. As we have noted, the Virginia round-leaf birch was apparently subject to wanton destruction last year. Even



The Virginia Wildflower Preservation Society ~ P.O. Box 541; Annandale, Virginia 22003

the adult plants in the National Forest would be unprotected under present law. We urge you to support proposals to outlaw vandalism against listed plants.

2. Protection of candidate species

Only a small fraction of the Commonwealth's and Nation's biologically endangered plants are as yet listed for protection. As of 1983, the U.S. Fish and Wildlife Service had identified 1,019 critical species and subspecies of plants. It was then certain on the basis of available evidence that these plants required protection of the Act; however, the plants were not listed due solely to bureaucratic and budgetary constraints. An additional 1,569 species are believed to deserve listing but further study is necessary. This contrasts with the mere number of 85 plant species presently listed. In Virginia, only two species out of 55 "candidates" are now listed.

Whatever additional resources are provided for implementing the Act (see point #3 below), it is clear that it will be years, if not decades, before all these species can be listed. Many will become extinct in the meantime. Therefore, VWPS considers it essential that some protection be extended to these vulnerable species. We urge you to support proposals to require that federal agencies confer with the Fish and Wildlife Service when their actions may affect a "candidate" species.

3. Increased resources for the endangered species program

The huge backlog in listing candidate species has already been mentioned; we add here that it is not limited to plants species, but includes about 1,000 animal species as well.

We are also concerned that lack of resources has crippled programs to bring about the recovery of species that are listed -- that is, to achieve the overriding purpose of the Act.

The FWS lacks adequate funds and staff to carry out the 164 "recovery plans" that it has already prepared, much less the hundreds more still in development. If these plans remain mere pieces of paper, the species will probably continue their decline to extinction. For example, little is known about the threats to the survival of the small whorled pogonia. The FWS has identified a research program costing about \$40,000 per year to uncover these factors. Included would be monitoring of existing populations, conducting demographic studies, research on the species' mycorrhizal requirements (orchids depend on fungi on their roots to help them absorb necessary nutrients), and research on the species' reproduction. Because of inadequate funds, the FWS has been able to begin only the monitoring and demographic studies. The other factors remain unknown.

The states, including Virginia, have a major role to play in protecting and enhancing the recovery possibilities of endangered and threatened species. The Act provides for federal matching funds to help the states carry out this responsibility -- which is, after all, in support of a federal program. However, the funds authorized for this purpose are far too few -- \$6 million -- to enable the over 43 states to carry out meaningful programs for the 330+ endangered and threatened species in the Nation.

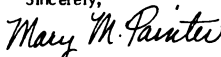
By the end of this century, 15-20% of all plant and animal species on Earth may be extinct. This would mean the permanent loss of an estimated 25,000 vascular plant species alone. Extinctions will be most numerous in the tropics, where the number of species is high and human pressures great. The principal cause of this impending catastrophe is destruction of habitat. Introduction of exotic species is also an important cause through Section 8 of the Endangered Species Act and several multilateral and bilateral agreements, the U.S. Department of Interior provides training and other assistance to foreign wildlife and parks staff to improve conservation of these biological riches.

Finally, wild plant species that are traded for horticulture are protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture, enforces CITES for plants. APHIS requires a small line-item authorization in order to supplement its regular staff with inspectors trained in identifying the species of orchid, cactus, or other plant in trade; and investigators to bring cases against violators of CITES.

Therefore, the VWPS urges you to support proposals to increase the authorizations for the Endangered Species Act to the following levels: for the Fish and Wildlife Service, \$50 million; for \$6 cooperative programs with the states, \$25 million; for international cooperation under §8, \$25 million; and for the Department of Agriculture's Animal and Plant Health Inspection Service, \$250,000.

Thank you for your consideration.

Sincerely,



Mary M. Painter
President

MMP/ak
Enclosure



TED STRICKLAND
President of Senate
9361 Knox Court
Westminster, Colorado 80030
866-3342

Senate Chamber
State of Colorado
Denver

March 28, 1985

Honorable John Breaux
Chairman
Subcommittee on Fish and Wildlife
Conservation and Environment
U.S. House of Representatives
Room 1336, Longworth Building
Washington, D.C. 20515

Re: Endangered Species Act Reauthorization

Dear Chairman Breaux:

Please include in the record of your Endangered Species Act reauthorization hearings the enclosed original of Senate Joint Memorial No. 2, recently adopted by the Colorado General Assembly.

As you consider reauthorizing the subject Act, we of the Colorado General Assembly ask that you, your committee, and the Congress pay particular attention to the potential conflict between state and local responsibilities for water supply and the goals and terms of the Endangered Species Act.

We are convinced that ways can be found to conserve endangered species in the South Platte and Colorado River basins without interfering with interstate water compact entitlements, equitable apportionment decrees, and water rights which have been created under state law. An endangered fish stocking program in the Colorado River and mechanical brush and tree clearing in the whooping crane habitat in Nebraska appear to hold great promise.

The Colorado General Assembly is opposed to any moratorium or halt on water development in the Colorado or Platte River basins with respect to each state's allocation of Colorado and South Platte River waters. We endorse the working groups which have been formed under the leadership of the Secretary of Interior regarding water rights/endangered species issued in both basins. A two year reauthorization period for the Endangered Species Act we believe to be preferable, so that we and the Congress can examine the outcome of the current work effort and determine whether changes to the Act are necessary, in view of interstate water compacts and state water management responsibilities. We do not believe that changes should necessarily be made at this time.

Sincerely,

Ted Strickland

Encl.

1985

SENATE JOINT MEMORIAL NO. 2.

BY SENATORS Bishop, Allard, Beatty, Brandon, Callihan, Durham, Fenlon, Glass, McCormick, Meiklejohn, Noble, Ray Powers, Strickland, Wattenberg, Wells, and Winkler; also REPRESENTATIVES Younglund, Artist, Bath, Bledsoe, Brown, Bryan, Carpenter, Entz, Hamlin, Mutzebaugh, Pankey, Paulson, Shoemaker, Swenson, Tebedo, Underwood, and D. Williams.

URGING THAT THE GOVERNMENT OF THE UNITED STATES RESOLVE QUESTIONS REGARDING ENDANGERED SPECIES IN THE PLATTE RIVER BASIN AND THE COLORADO RIVER BASIN IN A MANNER WHICH FULLY RESPECTS INTERSTATE WATER COMPACTS, EQUITABLE APPORTIONMENT DECREES, AND THE WATER RIGHTS SYSTEMS OF THE RESPECTIVE STATES.

WHEREAS, In 1982, the Fifty-third General Assembly of the state of Colorado adopted Senate Joint Memorial No. 1, urging that the Government of the United States refrain from interfering with state water allocation systems, water rights, and compact entitlements through misuse of the federal Endangered Species Act; and

WHEREAS, The Secretary of the Interior has established state-federal work groups for the Colorado River and Platte River basins in order to determine how to meet the terms of the Endangered Species Act while fully maintaining the compact entitlements, equitable apportionment decrees, and water rights systems of the affected states of Colorado, Wyoming, Utah, and Nebraska; and

WHEREAS, Nonflow alternatives for management of endangered or threatened fish and wildlife may alleviate

conflict between state water administration and preservation of endangered fish and wildlife in the Colorado and Platte River basins; and

WHEREAS, Nonflow alternatives should be the first priority for management; and

WHEREAS, Preservation of endangered species is a national goal and should be nationally funded; and

WHEREAS, Use of regulatory mechanisms, such as section 404 dredge and fill permits, to require the uncompensated surrender of all or part of a water right as the price for pursuing exercise of that right, is repugnant to the laws of Colorado; and

WHEREAS, There is a legitimate question as to whether the designated whooping crane habitat on the Platte River in central Nebraska is a truly critical habitat for that species; now, therefore,

Be It Resolved by the Senate of the Fifty-fifth General Assembly of the State of Colorado, the House of Representatives concurring herein:

(1) That the exercise of water rights under state water law systems should proceed in the Colorado River and Platte River basins, in accordance with applicable interstate compacts, equitable apportionment decrees, and the water laws of the affected states; and

(2) That the Department of Interior, in administering the Endangered Species Act, should put a first priority on the use of nonflow management alternatives for preservation of endangered or threatened species; and

(3) That where water is required for preservation of endangered or threatened species, based upon sound scientific analysis, such water should be purchased or obtained by the federal government under section 5 of the Endangered Species Act, not through use of section 7 of the Act; and

(4) That the Platte River and Colorado River basins state-federal work groups should proceed expeditiously to spell out a process or plan which will meet the terms of the

Endangered Species Act while fully maintaining the compact entitlements, equitable apportionment entitlements, and water rights in the affected states of Colorado, Wyoming, Utah, and Nebraska; and

(5) That the Department of the Interior should implement a temporary moratorium on additional listings of endangered or threatened species which may adversely impact state water administration pending completion of the process described in subsection (4); and

(6) That the designated critical habitat of the whooping crane in central Nebraska on the Platte River should be examined for delisting, and it should be delisted if it is not absolutely necessary for the survival of the whooping crane; and

(7) That the Endangered Species Act should be amended to require the Fish and Wildlife Service and other federal agencies to place first priority on nonflow management alternatives, when conflicts with state water allocation systems and water rights are otherwise a potential; and such other amendments to the Endangered Species Act should be made as are necessary to preserve to the states their management systems.

Be It Further Resolved, That copies of this Memorial be sent to each member of the Congress from Colorado, to the Senate and House Committees of Reference which must examine reauthorization of the Endangered Species Act, to the Governors and Legislatures of Wyoming, Nebraska, and Utah, to the Secretary of the Interior, the Secretary of the Army, and the Secretary of Agriculture.



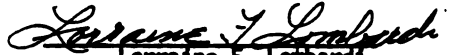
Ted L. Strickland
PRESIDENT OF
THE SENATE



Carl B. Bledsoe
SPEAKER OF THE HOUSE
OF REPRESENTATIVES



Marjorie L. Nielson
SECRETARY OF
THE SENATE



Lorraine F. Lombardi
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

DEPARTMENT OF FISH AND GAME

1416 NINTH STREET
SACRAMENTO, CALIFORNIA 95814
(916) 445-3531



April 5, 1985

The Honorable John Breaux
Chairman, House Subcommittee on
Fisheries and Wildlife Conservation
and the Environment
H2-544
House of Representatives
Washington, D.C. 20515

Dear Congressman Breaux:

This is to provide you with the position of the California Department of Fish and Game regarding the reauthorization of the Endangered Species Act as it pertains to the California sea otter.

The sea otter in California has been protected by State law since 1913 when it was listed as a "Fully Protected Mammal" (Section 4700, Fish and Game Code). Under State law, no fully protected mammals or parts thereof may be taken or possessed at any time. Exceptions for scientific research may be authorized by the California Fish and Game Commission. In 1941, the State of California created a sea otter refuge, which was extended in 1959 to encompass all land west of Highway 1 to the State's three mile territorial limit from the Carmel River south to Santa Rosa Creek. Within this zone, it is illegal to possess any firearms except under special permit. Given these protections, a viable sea otter population now occupies a major segment of California's most productive coastline.

Throughout much of the twentieth century, the sea otter has been surrounded by controversy -- controversy over the shellfish it consumes, controversy over oil development, as well as controversy over management philosophies and objectives among different Federal and State agencies and special interest groups.

In many areas of the coast, in the absence of sea otters, shellfish resources grew and were subsequently harvested for commercial and recreational purposes. In the 1950's, as the sea otter expanded its range southward, conflicts with shellfish fisheries occurred. As a result, sea otters became the center of serious controversy between user groups -- those desiring to maintain an ever expanding sea otter population, and those desiring to harvest certain shellfish species for recreational and

commercial purposes. This controversy resulted in the adoption of California State Senate Concurrent Resolution No. 74, at the 1967 Legislative Session. The resolution directed the California Department of Fish and Game to determine the feasibility and possible means of confining sea otters within the existing sea otter refuge, or to explore other means that would maintain the existing abalone and sea otter populations and would lessen the possibilities of resource conflicts. A five-year research study was initiated by the Department in July 1968. However, with the enactment of the Marine Mammal Protection Act in 1972, which prohibited the taking of any sea otters, field studies were suspended.

The Department of Fish and Game believes that sea otters must receive continued protection, but their use of nearshore resources must be balanced with the historical use of these resources by man. We believe this can best be accomplished by "zonal" management, setting aside certain areas for sea otters and other areas for use by recreational and commercial fishermen.

In that context, the Department submitted a request to the U.S. Fish and Wildlife Service in August, 1974, for return of management authority to the State. A management plan submitted to the Secretary of the Interior proposed to use non-lethal means (capture and return) to restrict sea otters to the central California coastline between Seaside (near Monterey) and Cayucos (just north of Morro Bay, approximately 150 miles). The plan was opposed by a variety of environmental interests and found inadequate by the U.S. Fish and Wildlife Service. In January 1976, the State submitted a revised plan which ultimately was rejected. In 1977, the Department withdrew its application for return of management and was granted a research permit. Under the Federal permit, some taking (capture, tag and release) was allowed for research purposes, but no takings were allowed for "management" purposes. The Department has maintained a research program since that time (1977) to develop information and data on a variety of biological and life history issues for future protection and management of the sea otter population.

Any potential management program for sea otters was further impacted when the Department of the Interior classified the southern sea otter population as a "threatened" species in 1977. The determination was based on the potential threat to the sea otter population and its habitat from offshore oil spills. To eliminate or reduce any jeopardy to the sea otter population in the event of a catastrophic oil spill, the U.S. Fish and Wildlife Service subsequently recommended a translocation program to establish at least one additional colony of sea otters outside the current range.

The Department of Fish and Game has expressed its support, in principle, to a translocation effort within the historic range of the sea otter, subject to certain conditions and assurances on the part of the U.S. Fish and Wildlife Service. Conflicts between Federal and State agencies regarding a management approach for the California sea otter population are a product of each pursuing drastically different legislative mandates. While the State seeks to jointly manage sea otters and recreational and commercial fisheries, Federal law (Marine Mammal Protection Act and Endangered Species Act) affords strict and very clear priorities protecting sea otters, thereby severely limiting the management strategies available to California.

With the recent enactment of State regulations designed to eliminate accidental mortalities of sea otters entangled in gill and trammel nets, unrestricted population growth and range expansion will occur. In the absence of "zonal" management, the valuable recreational and commercial shellfisheries throughout the southern California mainland coast and offshore islands will eventually be impacted. Given the Department's legal mandates and responsibilities to all the people of California, we believe it is of paramount importance to not only provide for the continued protection of sea otters, but to provide for the continued recreational and commercial use of shellfish resources throughout the southern California Bight. Therefore, the Department of Fish and Game would like legal and financial assurances that the existing population (parent) can be restricted within specific geographical boundaries as part of an overall management and recovery program.

Specific authority to contain or restrict the existing population within a "zone" is not provided for in Federal law. We believe that translocation is only feasible if undertaken in conjunction with a legally implemented program that would provide the flexibility to use non-lethal methods (i.e. capture and return) to maintain sea otters north of Point Conception and to any potential translocated site within the State. We, therefore, recommend that the ESA be amended to give the Department of Fish and Game this flexibility. Only then can the State balance maintenance of fisheries against conservation of sea otters, thereby protecting the broad public interest.

Finally, translocation should not be undertaken unless accompanied by a comprehensive plan which includes specific goals and objectives pertaining to delisting criteria and procedures, as well as the development and determination of Optimum Sustainable Population (OSP), which must be realistic and consistent with the State's desire to protect both sea otters and shellfisheries. Legislative language to implement the above suggestions will be provided by the California Department of Fish and Game at the Committee's request.

Sincerely,


 Jack C. Parnell
 Director

cc: Karen Spencer



American Association of Zoological Parks and Aquariums

EXECUTIVE OFFICE AT OGLEBAY PARK, WHEELING, WV 26003 • 1896 (304) 242-2160

OFFICERS

President
ELVIE TURNER, JR.
Director
Fort Worth Zoological Park

President - Elect
GEORGE R. FELTON, JR.
Director
Greater Baton Rouge Zoo

Vice President
WARREN J. LUFF
Director
Dallas Zoo

Immediate Past President
CHARLES L. BIELER
Executive Director
Zoological Society of San Diego

Executive Director
ROBERT D. WAGNER
Oglebay Park
Wheeling, WV

DIRECTORS
EDWARD D. ASPER
Vice President/General Curator
Sea World of Florida

DONALD BRUNING, PH.D.
Curator/Ornithology
New York Zoological Park

L. RONALD FORMAN
Director
Audubon Park &
Zoological Garden

PALMER E. KRAVITZ, III
Director
Riverbanks Zoological Park

SHARON J. PROCTOR, PH.D.
Curator of Education
Vancouver Public Aquarium

JAMES C. SAVOY, D.V.M.
Director
Phoenix Zoo

GILBERT K. BOESE, PH.D.
Director
Milwaukee County Zoological Gardens

CHARLES H. MOESLE
Director
St. Louis Zoological Park

EDWARD C. SCHMITT
General Curator
Denver Zoological Gardens

April 17, 1985

The Honorable John Breaux
Chairman
Subcommittee on Fisheries, Wildlife
Conservation and the Environment
House Annex II, Room 540
Washington, D.C. 20515

Dear Chairman Breaux:

The American Association of Zoological Parks and Aquariums submits this letter for the record on the reauthorization of the Endangered Species Act (ESA). The AAZPA is the largest professional zoological park and aquarium organization in the world. AAZPA represents virtually every major zoological park, aquarium, wildlife park and oceanarium on the North American continent and the vast majority of the professional staff members employed therein. AAZPA also represents and is the official spokesman for nearly 300,000 members of various zoological park and aquarium support organizations that offer assistance to zoological facilities in their communities. Collectively, zoos and aquariums in this country annually play host to more than 100 million visitors.

The goals and objectives of AAZPA are "to provide education, recreation and cultural enjoyment through the exhibition, conservation and preservation of the earth's fauna". The purposes of the ESA are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved and to provide a program for the conservation of such species." We believe that the goals and objectives of AAZPA are supportive of and complementary to those of the ESA.

AAZPA plays an active role in the conservation and preservation of wildlife. Our Species Survival Plan strengthens and coordinates zoo breeding programs so that they can help in the worldwide effort to preserve vanishing species. The Plan seeks to (1) reinforce natural populations which have been reduced by human activities, disease or catastrophe; (2) provide animals for repopulation of original habitat when practicable; (3) serve as refuge for species destined for extinction in nature; (4) maintain repositories of germ plasma and; (5) conduct research and develop animal husbandry techniques to support both captive and wild populations.

A nonprofit, tax-exempt organization dedicated to the advancement of zoological parks and aquariums for conservation, education, scientific studies and recreation.

AAZPA supports the reauthorization of the Endangered Species Act without weakening amendments. AAZPA Institutional members have extensive experience with the Act, in particular with the permitting procedures established in section 10 (a) and (b). We support the continued limitation of permits for scientific purposes or for the enhancement of propagation or survival. The regulations establishing the criteria for these permits have been in tact since 1975 and have been changed several times. We believe this criteria provides needed checks and balances. There is already a burgeoning illegal trade in live wildlife and we support every effort to end that. We propose additional funding to enable full implementation of the Act.

Thank you for the opportunity to submit these comments for the record. We would be pleased to answer any questions and provide more information.

Most sincerely,

AMERICAN ASSOCIATION OF ZOOLOGICAL
PARKS AND AQUARIUMS



Robert D. Wagner
Executive Director

ROW/kdj

cc: Board of Directors

Wildlife Coalition International

1050 17th Street, N.W.
Washington, D.C. 20036
202-466-8270

The Honorable John Breaux
Chairman
Subcommittee on Fisheries, Wildlife
Conservation and the Environment
Committee on Merchant Marine and Fisheries
Rm. 1334
Longworth House Office Building
Washington, D.C. 20515

April 10, 1985

Re: Reauthorization of the Endangered Species Act of 1973

Dear Congressman Breaux:

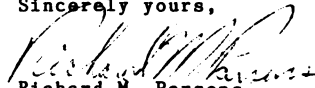
I recently submitted written testimony on behalf of the Wildlife Coalition International, to be included in the record of the hearings conducted by your subcommittee on the Endangered Species Act. I would like to supplement that testimony with the attached copy of an article appearing in the Spring, 1983 issue of a publication called *Animals Canada*.

The article is by the Director of the Toronto Metro Zoo, and it contains a good summary of some of the valid reasons for encouraging the captive breeding of a wide variety of endangered species. The publication which the article appears in is put out by the Canadian Federation of Humane Societies.

The article refers to the problems caused for the major zoos when the Endangered Species Act's restrictions first burst upon the scene. The major thrust of the article, which supports the thrust of our testimony, is summarized in the final paragraph, which says: "Legislation is piling up to prevent people from keeping endangered species. As long as we ensure good standards of accomodation and husbandry, shouldn't we be working to reverse the situation?"

Thank you for considering this additional material.

Sincerely yours,


Richard M. Parsons
General Counsel



ANIMALS CANADA



**Turtles As Pets ● Voluntary Ban on Seal Products
An Alternative for Endangered Species
Why Whales in Captivity?**

For Cats' Sake

Dr. Peter Crowcroft
General Director Toronto Metro Zoo

When the editor invited me to contribute to *Animals Canada* it was a pleasant surprise, as the relationship between humane societies and zoological parks has never been close or cordial. But the tone of the material in your journal, while being just as *caring* as in others, expresses a more objective attitude than I have found in other countries in which I have worked. In the United States, especially, people who care about animals have tended to align with the anti-zoo conservationists.

It is tragic when the battle lines are drawn between the wrong tribes. Only a minority of people are concerned about animals in any way. Within our thin ranks we have suffered from the same divisiveness as religious people, who fall out about details of doctrine, instead of working together to convert the heathen majority to a basic belief common to all believers.

Zoological parks are now taking their responsibilities for functioning as modern Noah's Arks very seriously. Conservation is now the avowed top priority objective of the American Association of Zoological Parks and Aquariums, which is the most influential 'trade' association of zoos in the world. Endangered Species Survival Committees are being set up to manage and expand zoo stocks of animals such as Gorilla, Rhino, Snow-leopard, and others. But the numbers of zoos and their capacities are far too low to do the job. Already, we are discussing 'triage' decisions — which species shall be admitted to the Arks, while most are abandoned to their fate.

I am going to put forward a heretical view, therefore, and propose that some species presently doomed to extinction could be saved by becoming pets. This is not a viewpoint held by my employers or my colleagues, although I hope to convert some of them to it. I hope we will be able to discuss the possibility objectively and in a constructive way, and to focus on the best interests of the animals, rather than on the interests of various kinds of people.

There is no natural law that says human law will develop in a logical or co-ordinated fashion. A free society tends to work on the 'squeaky wheel' principle; legislators tend to react to the protests of vociferous

groups. Some governments try to see to it that their departments do not get at cross purposes, or cancel out one another's efforts through lack of communication. Most governments have not yet attained this degree of sophistication. We have to watch out, therefore, that we do not write the wrong letters and voice the wrong protests to the wrong departments. It is a sad fact that much legislation aimed at benefiting an endangered species ends up having the opposite effect.

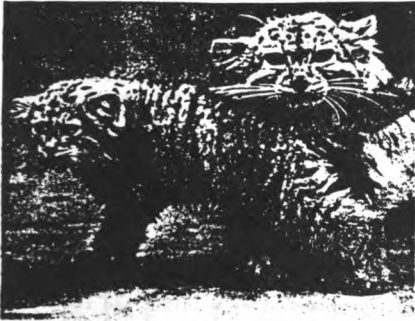
When the US Congress resolved hastily to protect the Bengal tiger by forbidding all commercial transactions involving them, the effect was that those of us running US zoos at that time had to stop our tigers from breeding. We could not move tigers from one place to another or dispose of offspring. So the zoo 'population' of tigers began to age and decline. Eventually, good sense prevailed, as the zoo wheel squeaked, and two distinct tiger populations were recognized: the wild population in need of rigid protection, and the captive one which was better off without it. The more tigers there are in captivity, whatever the interests of their owners, the better it will be for tigers in the long run.

Now there are several thousand different kinds of mammals, and mankind has domesticated only about a score. These domesticated species, and several others who are successful pets, are the only ones safe in a world inhabited by billions of people. Efforts to domesticate a few others, such as the Banteng in Indonesia, and the Eland in Africa have been locally successful, but have not shown enough potential for profit to cause people to substitute them for some of the millions of cows in existence.

Judging by the colourful articles and films which have been fashionable in the past decade, you would think that extinction is being brought about by unprincipled poachers, furriers, and collectors for the pet trade. Zoos have come in for their share of blame too. But there are very few species seriously affected by the taking of individuals for whatever purposes. The real danger to the world's wildlife is habitat destruction. There are two main causes of the widespread destruction which is going on; conversion of natural grazing for wildlife into farmland, and greed for the lumber 'locked up' in tropical forests.

In Africa especially, it is the need for growing food for growing numbers of people that is wiping out the wildlife. Even the National Parks are being nibbled away. In South America, it is the devastation of the tropical rain forest, for cheap beef production and for the cheap lumber. In order to focus on something specific in this huge mess, let us consider the lovely cats that inhabit the forests in Latin America.

There are no statistics to show the numbers destroyed by clearing because population densities are not known. One does not need figures, however, to



Pallas' cat Felis manul from the mountains of Turkestan, Siberia and Mongolia. Courtesy Chicago Zoological Society.

show that the proportion of animals destroyed is governed by the amount of forest habitat destroyed. If the entire forest goes, nothing that depended upon it for life can survive. The forest may have supported 10,000 cats or 100,000 cats. Habitat destruction kills them all, while other forms of exploitation, more often than not, remove a crop and may actually reduce natural mortality.

These cats are officially 'protected' if you want to catch one. But the destruction of their habitat is a matter for another department!

This kind of legislative folly is not just to be found in South America. My native land, Australia, is famous for it. There, it is very difficult to get permission to export a pair of kangaroos, unless it is to an approved public zoo. But in another government office, it is a matter of routine to get permission to shoot 1,000. You would be breaking the law if you shot only 998 of the 1,000 and sent the other two overseas.

Two thirds of the tropical rain forests in Latin America have already gone, and the rest is going fast. The lovely cats, such as the Margay, cannot be taken for any purpose, so they are doomed. I don't think

anyone has written to the appropriate government with a serious proposal for rescue. If 'Operation Noah' could be so successful in raising funds to relocate animals during the flooding of the Kariba Dam on the Zambezi, why not an equally successful campaign to rescue cats from the Amazon basin? Nowhere to accommodate them is the ready answer. I suggest we ought to seriously consider domesticating more species than our ancestors chose to do, and that these lovely little cats, and others from different habitats undergoing destruction, would make highly eligible candidates.



Sand cat Felis margarita from the deserts of North Africa and Afghanistan. Courtesy Chicago Zoological Society.

Purists will argue that domestication modifies the behaviour so much that the animals would never be capable of returning to the wild. This leads to the negative 'Better dead than hand-fed' philosophy. But anyone who has had to deal with feral cats, dogs, pigs or goats, knows how readily domesticated forms revert to their instinctive behaviour. I have a vivid memory of an attack by two white cats, when I picked up a kitten in an abandoned farm house in the outback. One landed on my thigh, and the other on my chest. (We all later became good friends). Even highly inbred strains of laboratory mice, when placed in an appropriate habitat, quickly demonstrate the survival of the 'Old Adam'.

Even if such misgivings about domestication should have some validity, the 'bottom line' in this situation is what matters. I have said for many years that I would rather have tigers with spots than no tigers at all. I feel just as willing to settle for Ocelots and Margays with stripes.

Legislation is piling up to prevent people from keeping endangered species. As long as we ensure good standards of accommodation and husbandry, shouldn't we be working to reverse the situation?



Hawk Mountain Sanctuary Association

Route 2, Kempton, Pennsylvania 19629 Telephone 215-766-8861

29 April 1985

OFFICERS

President

JOSEPH W. TAYLOR
30 Parikh Road
Honesdale, PA 18472

Vice President

PATRICIA T. BRADY
10 Ivy Court
Eames, PA 18042

Secretary

PETER EDGE
75th Floor, Sears Tower
Chicago, IL 60606

Treasurer

ALAN CRAWFORD, JR.
1511 Walnut Street
Philadelphia, PA 19102

DIRECTORS

KATHLEEN S. ANDERSON
PATRICIA T. BRADY
HOWARD P. BROOKAW
ALAN CRAWFORD, JR.
PETER EDGE
FRANK B. GILL
MICHAEL HARRWOOD
ROBERT C. HUGHES
CLIFFORD L. JONES
DANIEL KLEM, JR.
STEPHEN S. ORESMAN
WILLIAM H. PARKS
JOHN STROHMAYER
JOSEPH W. TAYLOR
MINTURN T. WRIGHT, III

Executive Director

STANLEY E. SENNER

Counsel

JAMES J. BRETT

Honorable John B. Breaux
Chairman
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
House Annex II, Room 544
Washington, DC 20515

Dear Mr. Chairman:

This letter concerns H.R. 1027, a bill to extend the Endangered Species Act. The Act is vital to present and future efforts to protect endangered species in this country, and it serves as a model for similar efforts throughout the world.

By way of background, the Hawk Mountain Sanctuary Association is a nonprofit educational organization, established to foster the conservation of birds of prey and other wildlife and the environment. Our 6,500 members support operation of a 2,000-acre sanctuary in southeastern Pennsylvania and a program in education, research, and conservation that is international in scope.

The Association supports a five-year extension of the Act, preferably with increased funding authorizations to enable more effective implementation. Two aspects of the legislation are of particular concern--the "raptor exemption" and the "Western Convention."

Raptor Exemption

As a result of the raptor exemption adopted in the 1978 amendments to the Act (and the discretionary authority granted by the Migratory Bird Treaty Act), the Fish and Wildlife Service is, by regulation, allowing commercial sales of captive-bred raptors. The Service adopted the regulations to alleviate human pressures on wild raptor populations and to encourage captive production of raptors for conservation, recreation, scientific, and breeding purposes.

The Association opposes commercial sales of captivebred raptors, and we strongly support modification of the Act to curtail such sales. Our reasons are as follows.

1) We are philosophically opposed to allowing our native avifauna--be they raised in captivity or taken in the wild--to be sold for profit. Commercialization has been at the heart of so many bird conservation problems (everything from plume and market hunters to the pet trade), that we must oppose any effort to institutionalize it.

2) When the Service adopted the regulations allowing commercial sales, they could cite no hard evidence that the then-prevailing prohibition on such sales was creating pressure on wild raptor populations or inhibiting captive production. The justification for their proposed rule (Federal Register, 12 January 1983) contained these assertions, but they offered no substantiating evidence.

3) Similarly, there is no evidence today that commercial sales have resulted in diminished pressure on wild populations or stimulated captive breeding for conservation purposes. In fact, evidence presented in hearings before your Subcommittee suggests that nearly all the peregrine falcons supplied to restoration programs have come from the nonprofit Peregrine Fund.

4) While many of the abuses uncovered by Operation Falcon in the United States and Canada occurred prior to adoption of the commercialization regulations, Operation Falcon has clearly demonstrated the potential to abuse the law to the detriment of wild populations.

5) We believe that allowing commercial sales creates an incentive for unlawful activities, and that there is no effective way to regulate such traffic. Given the premium placed on the genetic vigor of wild-bred stock, allowing commercial sales of captive-bred birds simply creates an incentive to take birds or eggs from the wild and to pass them off as being captive-bred.

Given the lack of hard evidence to justify commercial sales from the standpoint of raptor conservation, and given the ample evidence of the potential to abuse the law, we favor amending the raptor exemption to prohibit commercial traffic of any type. We do not oppose the breeding of exempt raptors in captivity because we recognize the contributions of such efforts to legitimate conservation and restoration efforts, nor do we oppose the use of exempt raptors by responsible falconers. Further, we do not not oppose a private breeder being compensated for his or her expenses when supplying birds to state-approved or -sponsored restoration programs. However, we are opposed to sales-for-profit under any circumstances.

Western Convention

As amended in 1982, the Act gives the Department of the Interior explicit guidance to carry out the provisions of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. As a result of this guidance and the funds which have been appropriated in the last three fiscal years (more than \$600K in total), the Fish and Wildlife Service has been able to carry out a number of important projects to encourage the conservation of migratory birds and other wildlife, as well as plants, in the Western Hemisphere.

Examples include a survey of coastal wetlands in South America, field studies on the effects of forest fragmentation on songbirds, and such projects in education and training as workshops on migratory bird conservation and management, translations of technical publications, and a meeting of Central American natural resource administrators.

Our organization has been involved with several of these projects, and it has been our experience that spending even modest amounts of money for conservation purposes in Latin America can have a great effect. For example, money spent to train one biologist has a "ripple effect" as that individual takes what he or she has learned and incorporates into their job and passes it on to their colleagues and students. If conservation efforts are to succeed, it is necessary to develop interest and expertise among citizens of our sister nations in the Western Hemisphere. For this reason we place a particularly high priority on the work of the Fish and Wildlife Service in the area of education and training for Latin American biologists and natural resource administrators.

The Association strongly supports retention of the Western Convention language in H.R. 1027, with an annual authorization of \$400K.

We thank you for considering the views of the Hawk Mountain Sanctuary Association and for your leadership in steering a reauthorization of the Act through the legislative process. We would appreciate it if this letter would be made a part of the public hearing record on H.R. 1027.

Sincerely,


Stanley E. Senner
Executive Director

ENDANGERED SPECIES ACT AND NATIVE AMERICAN RELIGIOUS PRACTICES

TUESDAY, JUNE 11, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FISHERIES AND WILDLIFE
CONSERVATION AND THE ENVIRONMENT,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:06 a.m., in room 1334, Longworth House Office Building, Hon. John Breaux (chairman of the subcommittee) presiding.

Present: Representatives Breaux, Thomas of Georgia, Lowry of Washington, Hutto, Young of Alaska, and Miller of Washington.

Staff present: Jeffrey A. Curtis, Paul E. Carothers, Norma Moses, Rod Moore, Thomas Melius, Ed Welch, Jacquelyn M. Westcott, and George D. Pence.

OPENING STATEMENT OF HON. JOHN B. BREAU, CHAIRMAN, SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

Mr. BREAU. The subcommittee will come to order.

This morning the subcommittee is meeting to hear witnesses on the Endangered Species Act as it relates to the practice of Native American religious practices.

In 1983, then Secretary of the Interior James Watt briefed this subcommittee on the results of an undercover or sting operation known as Operation Eagle. The Secretary at that time stated that undercover agents purchased over 200 evidentiary items, including 24 whole carcasses of bald eagles as well as parts from freshly killed birds and artifacts such as fans, necklaces, and headdresses.

The bald eagle is listed as endangered throughout much of the United States. The Secretary estimated that, nationwide, at least 300 bald eagles were killed every year to provide feathers for the manufacturers of artifacts.

A number of the persons caught in the sting operation were American Indians. In a case stemming from Operation Eagle, *United States v. Dion*, the Eighth Circuit Court of Appeals has found that the taking of bald eagles for traditional purposes on Indian reservations is protected by treaty rights and that the Endangered Species Act did not apply because it did not expressly abrogate or limit those treaty rights.

The court also found that the treaty rights do not extend to the sale of eagles or their parts and products or the taking of eagles for commercial purposes. All commercial activity is therefore illegal.

There are conflicting court decisions in other circuits, and it is my understanding that the Interior and Justice Departments are following the *Dion* decision in only those States that comprise the eighth circuit. Justice and Interior are also considering requesting the Supreme Court to grant certiorari.

We are, therefore, faced with an unsettled legal situation and conflicting interests. It will not be easy to balance the conservation needs of the eagle and other endangered species with the requirements of the American Indians for the practice of their religion.

I hope this hearing leads to a greater understanding of the issue and furthers our efforts to develop a fair solution.

Our ranking minority member, the gentleman from Alaska, is on his way and will be with us shortly to join us. Mr. Miller is already here. Do you have any comments, Mr. Miller?

Mr. MILLER. No, Mr. Chairman.

Mr. BREAU. We would like to welcome at this time our first witness, who will be appearing on behalf of the Department of the Interior, Ms. Marian Horn, who is Acting Solicitor with the Department of the Interior. You may introduce your colleagues, Ms. Horn, who are accompanying you. We are pleased to receive your testimony.

STATEMENT OF MARIAN HORN, ACTING SOLICITOR, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY TIM VOLLMAN, ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS; DONALD J. BARRY, ASSISTANT SOLICITOR, FISH AND WILDLIFE, DIVISION OF CONSERVATION AND WILDLIFE; ROLF L. WALLENSTROM, ASSOCIATE DIRECTOR, FEDERAL ASSISTANCE, U.S. FISH AND WILDLIFE SERVICE; AND CLARK R. BAVIN, CHIEF, DIVISION OF LAW ENFORCEMENT, U.S. FISH AND WILDLIFE SERVICE

Ms. HORN. Thank you, Congressman.

Sitting beside me, I have Timothy Vollman, who is the Associate Solicitor for the Division of Indian Affairs; Mr. Donald J. Barry, who is the Assistant Solicitor, Branch of Fish and Wildlife, the Division of Conservation and Wildlife; Mr. Rolf Wallenstrom, who is the Associate Director, Federal Assistance, U.S. Fish and Wildlife Service; and Mr. Clark Bavin, Chief, Division of Law Enforcement, for the Fish and Wildlife Service.

I ask your indulgence later in the questioning period to turn to them to respond more fully to your questions. I, myself, have become Acting Solicitor just 1 week ago, so we will try collectively to respond to your questions.

If I might start with an opening statement, let me first thank you for the opportunity to appear before you today to discuss the Endangered Species Act and its application to the taking of endangered and threatened wildlife species by Native Americans pursuant to treaty hunting rights.

My testimony will begin with a discussion of the recent Eighth Circuit decision in *United States v. Dion*. The *Dion* decision actually encompasses separate prosecutions of four Native Americans for

illegal takings and sales of eagles in violation of several laws, among them the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Endangered Species Act.

These prosecutions, and those of 28 other Native Americans, occurred as a result of a 2-year investigation into illegal takings and sales of eagles and other birds and their parts. The investigation focused in and around certain Indian reservations and National Wildlife Refuges in South Dakota and revealed that at least 51 eagles, predominantly bald eagles, had been killed by Native Americans who were engaged in the sale of the bodies and parts of those and other protected species. During the investigation, 24 eagle carcasses, 22 of which were bald eagles, were sold by Native Americans to undercover agents of the Fish and Wildlife Service.

The *Dion* court held that, absent an express congressional enactment, certain Native Americans could not be prosecuted for the noncommercial taking of bald eagles while exercising their treaty-protected hunting rights.

The eighth circuit adhered to its earlier ruling in the *United States v. White* and refused to follow the contrary holding in *United States v. Fryberg*. Also, the *Dion* court distinguished recent Supreme Court opinions which have held that reasonable and necessary conservation measures can apply to the exercise of treaty hunting and fishing rights.

The *Dion* court decided that this principle is limited in application to the unique circumstances of the Pacific Northwest Stevens Treaties and expressly rejected its application to the exercise of reserved hunting rights in the eighth circuit. In its place, the eighth circuit announced a Native American right to exercise reserved hunting and fishing rights, free of any conservation limitations.

The Department disagrees with the holding and rationale of the *Dion* decision. It is the position of this Department that while Congress did apply the prohibitions of the ESA to reserved hunting rights, it never intended that application to be an abrogation of those treaty hunting rights.

Instead, the ESA represents an effort to regulate, through limited reasonable and necessary nondiscriminatory conservation measures, the exercise of those rights by Native Americans. Such conservation measures can be imposed consistent with earlier Supreme Court cases.

As an extreme example of why the protections of the ESA are important, if endangered species become extinct, any rights to hunt them become moot. The ESA is directed toward the recovery and delisting of federally protected species, a recovery that incidentally benefits Indians and which will preserve the subject of their treaty hunting rights for the future.

We view this as consistent with the Government's general trust responsibility with regard to Indian treaty rights. Accordingly, the Department takes the position that the ESA is a reasonable and necessary nondiscriminatory conservation measure that applies to the exercise of reserved hunting rights by all Native Americans.

For these reasons, we have indeed requested the Department of Justice to consider seeking review of the *Dion* decision by the Supreme Court. The *Dion* decision, if left unchallenged, could have a significant negative impact on conservation programs for certain

endangered and threatened species listed under the Endangered Species Act, especially in those States included in the eighth circuit.

For example, the Fish and Wildlife Service estimates that 21 percent of all bald eagles, or over 2,000 eagles, counted in the coterminous United States during a 1984 midwinter bald eagle survey were contained within the boundaries of the seven States comprising the eighth judicial circuit.

The eighth circuit also contains approximately 28 Indian reservations, many of which are in proximity to critical national wildlife refuge areas. Several national wildlife refuge areas, including the Karl Mundt Refuge, which was specifically established for the conservation and recovery of bald eagles, border on Native American reservations or are separated from them only by rivers which the eagles use as a source of food.

Throughout the lower 48 States, bald eagles are found on approximately 105 Indian reservations. The effect of unlimited take of bald eagles from Native American lands on the continued existence and recovery of this species is therefore potentially great.

It should be noted that both Congress and the Fish and Wildlife Service have recognized a need for some Native Americans to acquire and possess feathers and other parts, of both bald and golden eagles for religious purposes. In this regard, the Service maintains a repository at Pocatello, ID, from which feathers, parts, and carcasses of eagles may be legally disbursed, after being collected from accidental killings, birds dying from natural causes, or birds acquired by the Service after illegal takings.

The Service has documented a demand for eagle parts and carcasses through requests for disbursements from the Pocatello facility and for permits issued by the various special agents in charge in each region of the Service. During the 7 complete fiscal years of the facility's operation, 1977 to 1984, the Pocatello Supply Depot filled an average of 567 orders per year in an effort to fulfill bona fide Native American religious needs without impairing our national effort at eagle conservation.

As a result of the Federal wildlife conservation resource problems, actual and potential, posed by the *Dion* ruling, the Department is attempting to resolve this problem judicially. Our general preference is that the Endangered Species Act be reauthorized without amendment and that, if amendments are forthcoming, they be limited to necessary technical amendments.

Nevertheless, should Congress choose to do so, the Department would have no objection to an amendment to the definition of "person" in section 3(13) to provide expressly that members of Native American tribes with hunting and fishing rights—reserved, treaty-recognized, aboriginal, statutory, or otherwise—and Native American tribal governments are covered by the prohibitions of sections 4(d) and 9 of the ESA. This amendment would address the questions raised by the eighth circuit's opinion in the *Dion*, case.

Such amendment would clarify and reaffirm the application of the provisions of the ESA to Native Americans without abrogating valid treaty rights. We, however, believe as the Secretary expressed in his letter of May 9, 1985, that Native Americans should have

full opportunity to comment on this amendment, and we therefore thank the committee for scheduling this hearing.

The Department is conscious of the need to provide for the use of eagle and other endangered or threatened fish or wildlife parts for valid religious purposes by some Native Americans. Therefore, if any amendment is considered, a new paragraph should be also added to section 10(a) of the ESA that indicates that the Secretary of the Interior may permit the taking of listed species by Native Americans for bona fide religious purposes, but only if such taking is not likely to jeopardize the continued existence of such species and the request cannot otherwise be satisfied through existing inventories of specimens owned by the United States and in the possession and control of the Secretary.

By adhering to these safeguards, both the conservation of listed species and the free exercise of Native American religious freedom will be furthered. I cannot claim an awareness of all Native American religious practices or ceremonies that involve the use of specimens or parts of endangered or threatened species. Therefore, we are prepared to work with Indian tribal governments to identify these religious concerns and also to improve law enforcement efforts to stop the killing of endangered species. We view this cooperative effort as essential to ensure preservation of those species.

We recognize the primary role of tribal governments and Indian religious leaders in determining the religious significance of particular wildlife species. If an amendment to section 10(a) is adopted to accommodate Native American religious uses of listed species, the Department intends to implement a regulatory procedure that will include tribal governments and Indian religious leaders on a cooperative basis in the certification of bona fide Native American religious practices involving the use of endangered or threatened species.

Thank you, gentlemen, for giving the Department this opportunity to address the issues, and we will be glad to answer any further questions.

[Prepared statement of Ms. Horn follows:]

PREPARED STATEMENT OF MARIAN BLANK HORN, ACTING SOLICITOR, U.S.
DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to discuss the Endangered Species Act and its application to the taking of endangered and threatened wildlife species by Native Americans pursuant to treaty hunting rights.

My testimony will begin with a discussion of the recent 8th Circuit decision in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985). The *Dion* decision actually encompasses separate prosecutions of four Native Americans for illegal takings and sales of eagles in violation of several laws, among them the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Endangered Species Act (ESA). These prosecutions, and those of 28 other Native Americans, occurred as a result of a two year investigation into illegal takings and sales of eagles and other birds and their parts. The investigation focused in and around certain Indian reservations and National Wildlife Refuges in South Dakota and revealed that at least 51 eagles (predominantly bald eagles) had been killed by Native Americans who were engaged in the sale of the bodies and parts of those and other protected species. During the investigation, 24 eagle carcasses (22 of which were bald eagles) were sold by Native Americans to undercover agents of the Fish and Wildlife Service.

The *Dion* court held that, absent an express Congressional enactment, certain Native Americans could not be prosecuted for the noncommercial taking of bald eagles while exercising their treaty-protected hunting right. The Eighth Circuit ad-

hered to its earlier ruling in *United States v. White*, 508 F.2d 453 (8th Cir. 1974), and refused to follow the contrary holding in *United States v. Fryberg*, 622 F.2d 101 (9th Cir. 1980). Also, the *Dion* court distinguished recent Supreme Court opinions (e.g., *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165 (1977); *Washington Game Department v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe v. Washington Game Department*, 391 U.S. 392 (1968)), which have held that reasonable and necessary conservation measures can apply to the exercise of treaty hunting and fishing rights. The *Dion* court decided that this principle is limited in application to the unique circumstances of the Pacific Northwest Stevens Treaties and expressly rejected its application to the exercise of reserved hunting rights in the Eighth Circuit. In its place, the Eighth Circuit announced a Native American right to exercise reserved hunting and fishing rights, free of any conservation limitations.

The Department disagrees with the holding and rationale of the *Dion* decision. It is the position of this Department that, while Congress did apply the prohibitions of the ESA to reserved hunting rights, it never intended that application to be an abrogation of those treaty hunting rights. Instead, the ESA represents an effort to regulate, through limited reasonable and necessary, nondiscriminatory conservation measures, the exercise of those rights by Native Americans. Such conservation measures can be imposed consistent with the *Puyallup* cases. As an extreme example of why the protection of the ESA are important, if endangered species become extinct, any rights to hunt them become moot. The ESA is directed toward the recovery and delisting of Federally protected species, a recovery that benefits Indians and which will preserve the subject of their treaty hunting rights for the future. We view this as consistent with the government's general trust responsibility with regard to Indian treaty rights. Accordingly, the Department takes the position that the ESA is a reasonable and necessary, nondiscriminatory conservation measure that applies to the exercise of reserved hunting rights by all Native Americans. For these reasons, we have requested the Department of Justice to consider seeking review of the *Dion* decision by the Supreme Court.

The *Dion* decision, if left unchallenged, could have a significant negative impact on conservation programs for certain endangered or threatened species listed under the Endangered Species Act, especially in those states included in the Eighth Circuit. For example, the Fish and Wildlife Service estimates that 21% of all bald eagles (or 2,452 eagles) counted in the conterminous United States during a 1984 midwinter bald eagle survey were contained within the boundaries of the seven states comprising the Eighth Judicial Circuit. The Eighth Circuit also contains approximately twenty-eight Indian Reservations, many of which are in proximity to critical national wildlife refuge areas. Several national wildlife refuges—including the Karl Mundt Refuge, which was specifically established for the conservation and recovery of bald eagles—border on Native American reservations or are separated from them only by rivers which the eagles use as a source of food. Throughout the lower forty-eight states, bald eagles are found on approximately 105 Indian reservations; the effect of unlimited take of bald eagles from Native American lands on the continued existence and recovery of this species is potentially great.

It should be noted that both Congress and the Fish and Wildlife Service have recognized a need for some Native Americans to acquire and possess feathers and other parts of both bald and golden eagles for religious purposes. In this regard, the Service maintains a repository at Pocatello, Idaho, from which feathers, parts, and carcasses of eagles may be legally disbursed, after being collected from accidental killings, birds dying from natural causes, or birds acquired by the Service after illegal takings. The Service has documented a demand for eagle parts and carcasses through requests for disbursements from the Pocatello facility and for permits issued by the various special Agents in Charge in each region of the Service. During the seven complete fiscal years of the facility's operation (FYs '77-'84), the Pocatello Supply Depot filled an average of 567 orders per year in an effort to fulfill bona fide Native American religious needs without impairing our national effort at eagle conservation.

As a result of the federal wildlife conservation resource problems, actual and potential, posed by the *Dion* ruling, the Department is attempting to resolve this problem judicially. Our general preference is that the Endangered Species Act be reauthorized without amendment and that, if amendments are forthcoming, they be limited to necessary technical matters. Nevertheless, should Congress choose to do so, the Department would have no objection to an amendment to the definition of "person" in Section 3(13) to provide expressly that members of Native American tribes with hunting and fishing rights (reserved, treaty-recognized, aboriginal, statutory or otherwise) and Native American tribal governments are covered by the pro-

hibitions of Sections 4(d) and 9 of the ESA. This amendment would address the questions raised by the Eighth Circuit's opinion in the *Dion* case.

Such amendment would clarify and reaffirm the application of the provisions of the ESA to Native Americans without abrogating valid treaty rights. We, however, believe as the Secretary expressed in his letter of May 9, 1985, that Native Americans should have full opportunity to comment on this amendment and thank the committee for scheduling this hearing. The Department is conscious of the need to provide for the use of eagle and other endangered or threatened fish or wildlife parts for valid religious purposes by some Native Americans. Therefore, if any amendment is considered, a new paragraph should also be added to Section 10(a) of the ESA that indicates that the Secretary of the Interior may permit the taking of listed species by a Native American for bona fide religious purposes, but only if such taking is not likely to jeopardize the continued existence of such species and the request cannot otherwise be satisfied through existing inventories of specimens owned by the United States and in the possession and control of the Secretary. By adhering to these safeguards, both the conservation of listed species and the free exercise of Native American religious freedom will be furthered. I cannot claim an awareness of all Native American religious practices or ceremonies that involve the use of specimens or parts of endangered or threatened species. Therefore, we are prepared to work with Indian tribal governments to identify these religious concerns and, also, to improve law enforcement efforts to stop the killing of endangered species. We view this cooperative effort as essential to ensure preservation of those species. We recognize the primary role of tribal governments and Indian religious leaders in determining the religious significance of particular wildlife species. If an amendment to Section 10(a) is adopted to accommodate Native American religious uses of listed species, the Department intends to implement a regulatory procedure that will include tribal governments and Indian religious leaders on a cooperative basis in the certification of bona fide Native American religious practices involving the use of endangered or threatened species.

Thank you for giving the Department this opportunity to address the issues. We will be glad to answer any further questions.

Mr. BREAUX. Thank you very much, Ms. Horn, for your testimony.

You say on page 4 that Interior has requested the Department of Justice to consider seeking review of the *Dion* decision by the Supreme Court. If Interior disagrees so strongly with the decision, why is there any question of whether or not Justice is going to request certiorari? Is that a difficult decision for them?

Ms. HORN. We have just recently sent over a letter asking them to review the second *Dion* decision, and we really have not had any discussions on it. I don't anticipate its being a difficult set of discussions, but the procedure normally is for the Department to request the Department of Justice to seek certiorari on behalf of the Department of the Interior. It is normal procedure that is followed.

Mr. BREAUX. Well, how long are we going to have to wait before we know what Justice is going to do in this regard?

Ms. HORN. I don't believe we will have to wait terribly long, but as I say, the request just recently went over.

Mr. BREAUX. How many actual arrests were made of how many individuals?

Ms. HORN. In the sting operation, sir?

Mr. BREAUX. Yes.

Ms. HORN. If I might, I would like to turn to Mr. Bavin and ask him to answer that question.

Mr. BAVIN. Mr. Chairman, at this point in Operation Eagle, which was the last case involving feather traffic, we have had 41 convictions to date. There are still a couple of cases that are pending.

Mr. BREAU. How many of the convictions were overturned by the appellate court?

Mr. BAVIN. Two convictions were overturned.

Mr. BREAU. All the rest of them were allowed to remain as a conviction, were allowed to stand?

Mr. BAVIN. Yes, sir.

Mr. BREAU. Of the two that were overturned, were they the ones that were overturned because of the principle of tribal religious rights?

Mr. BAVIN. No. The two that were overturned were as a result of an entrapment defense.

Mr. BREAU. Where did the religious doctrine come from? Were all the 41 convicted on all counts, or were some of the counts dismissed because of the defense of a religious tribal right?

Mr. BAVIN. Let me have Mr. Barry answer that.

Mr. BARRY. If I could, only one of the defendants made the religious freedom argument a major part of his case, and that was rejected by the eighth circuit. Now, this person had also been convicted for the commercial sale of eagle parts and products, and basically, what the eighth circuit did was conclude that the district court had been right in stating that there was no religious right involved which included commercial sale of eagle parts and products.

So in this case, even though the defendant had raised that in the eighth circuit, the eighth circuit rejected it and found that Indian religious practices did not extend to the sale of bald eagle parts and products.

Mr. BREAU. Did any of the defendants have any counts dismissed against them on the basis of their defense that the takings were for religious purposes?

Mr. BARRY. No.

Mr. BREAU. So is the religious doctrine that the *Dion* case stands for really a dictum of the court, or was it specifically used in the defense of any of the defendants that were in fact upheld by the court of appeals?

Mr. BARRY. If I could, we don't really view the *Dion* case as basically being a first amendment case, a religious freedom case.

Mr. BREAU. It seems that is what page 2 of the Department's testimony says.

Mr. BARRY. Well, I am not disagreeing that some of the defendants tried to raise that as an argument. What I am suggesting is that, from the Department's point of view, we did not view this as a first amendment case.

Mr. BREAU. What about page 2 of Ms. Horn's testimony when it says, "The *Dion* court held that, absent an express congressional enactment, certain Native Americans could not be prosecuted for the noncommercial taking of bald eagles while exercising their treaty-protected hunting right"?

Mr. BARRY. OK, I see what you are saying.

Ms. HORN. There is a difference.

Mr. BARRY. Yes, there is a difference between a first amendment religious freedom defense versus a reserved treaty right, and what the eighth circuit did in that case was concluded that neither the Endangered Species Act nor the Bald Eagle Act had sufficiently

shown congressional intent to override the exercise of those reserved treaty rights.

Mr. BREAUX. Were any of the defendants released from their charge by the Department because of the treaty right defense?

Ms. HORN. Two of them.

Mr. BARRY. Yes. A couple of the defendants had their pretrial motions granted to have counts dismissed that were based exclusively on a taking charge. In effect, what the court did was make a distinction between commercial sales—which it said are subject to the act—versus takings that were not connected with commercial sale.

In the context of a taking, the district court and the eighth circuit reaffirmed the earlier *Jackie White* decision from the eighth circuit which concluded that the Bald Eagle Act did not include the taking of bald eagles on reservations by Native Americans exercising reserved hunting rights.

Mr. BREAUX. What is the basis of the Department's appeal? What would you specifically be trying to get overturned if the Justice Department follows the recommendation of the Interior Department?

Mr. BARRY. We have not had a chance to discuss with the Justice Department what any brief to the Supreme Court would look like should they decide to seek a petition for certiorari. But, from the Department's point of view, we would basically recommend that the Justice Department follow the rationale set out in the Solicitor's opinion signed in 1980 regarding the application of the Endangered Species Act and one that was signed a couple of years later regarding the application of the Bald and Golden Eagle Protection Act to reserved hunting rights.

Basically, what we assert is that when Congress enacted those statutes, they intended that they be viewed as reasonable and necessary conservation measures which could be a source of authority for the Federal Government to regulate the exercise of a reserved hunting and fishing treaty right.

We rely upon a number of Supreme Court cases coming out of the Pacific Northwest which established the principle that reserved hunting rights are not absolute and that they can be subjected to reasonable and necessary conservation measures which are applied in a nondiscriminatory fashion.

The *Dion* case in the eighth circuit rejected that whole line of Supreme Court cases and concluded that they are not applicable to a treaty right which it called "exclusive," versus an "in common" treaty right, which was the type of treaty right that you had in the Pacific Northwest cases.

Mr. BREAUX. Do I understand the case correctly to say that the Endangered Species Act does not apply to American Indians when they are exercising a treaty right?

Mr. BARRY. That is correct.

Mr. BREAUX. And the position of the Department of the Interior is that you do not agree with that, isn't that correct?

Ms. HORN. We do not agree with that. The position of the court was that, absent specific overturning in the ESA of the treaty rights, it would not be read into the case.

Mr. BREAU. The suggestion that you make on page 6, Ms. Horn, is that we enact legislation, and you suggest that the legislation or an amendment would provide expressly that members of Native American tribes with hunting and fishing rights, et cetera, and Native American tribal governments are covered by the prohibitions of sections 4(d) and 9 of the Endangered Species Act, and also that a new paragraph would be added that would indicate that the Secretary may permit the taking of listed species by a Native American for bona fide religious purposes, but only if such taking is not likely to jeopardize the continued existence of such species, et cetera.

My question is how can we ever allow the taking of an endangered species without, at the same time, jeopardizing the continued existence of that species? How can any taking of a species that is endangered, the most delicate position that any species can find itself in, how can taking for whatever reason not jeopardize the continued existence of that species?

Ms. HORN. We believe that there is a way to balance the competing needs here, and of course, through the Pocatello facility, we can satisfy most, if not all, of the requests for eagle feathers that we have had to date. It is a difficult balance, but we believe that by careful watching we have been able to do it thus far and that we can do it in the future.

If you would like some expanding on that, I can turn it over to Mr. Wallenstrom, and he can tell you more specifically how the Fish and Wildlife Service proposes to do that.

Mr. BREAU. Well, I note that you said we have the facility at Pocatello that allows for the taking of feathers or other parts of eagles that have been accidentally killed or have died a natural death. Is that not sufficient to take care of religious needs of American Indians?

Ms. HORN. We believe, to date, that we have been able to satisfy most of those requests that we have received. Hypothetically, I suppose we could foresee an extreme situation in which we would be unable to fulfill a request from Pocatello and might have to review a request, and it is to that intent that we made the proposals in my testimony.

Mr. BREAU. How many eagles are we going to allow to be taken under the Department's proposal for religious purposes?

Ms. HORN. We would hope not to allow any taking beyond the Pocatello facility, but hypothetically we can conceive of an extreme situation in which it might be necessary to allow an individual taking for religious purposes if all other alternatives failed.

Mr. BREAU. How many requests has the Pocatello facility received that have been able to be fulfilled?

Ms. HORN. If I may, I would like to turn that over to Mr. Bavin or Mr. Wallenstrom. I guess Mr. Wallenstrom is prepared to answer that.

Mr. BAVIN. Mr. Bavin will answer it. [Laughter.]

We received and filled annually over the last 7 years and average of 567 requests for eagles or eagle feathers. The number of requests fluctuates from year to year during that time. Some are for whole carcass birds; some are for individual feathers; some are for fans, talons, wings, and so on.

In terms of wings and talons and individual feathers, we can fill those orders out of the stock that we have as they come in. We don't have a supply to fill requests for whole carcass birds and for whole tail fans, on an immediate basis, and we have around 600 pending applications for those types of items. We have about 150 birds in stock right now. So there is a delay in terms of filling these orders by 1½ years, something like that.

Mr. BREAU. How do you guarantee that none of those artifacts, those eagles, after they are transmitted, do not find their way into commerce in some way?

Mr. BAVIN. There is no way to guarantee that, sir. In fact, we have had situations where we have purchased, undercover, feathers that we have given out for religious purposes.

Mr. BREAU. Of feathers that you gave out from the Pocatello facility for religious purposes, you bought back?

Mr. BAVIN. That is correct, sir. We had marked them in a certain fashion.

Mr. BREAU. I don't take it you bought them back for religious purposes.

[Laughter.]

Mr. BAVIN. No, sir.

Mr. BREAU. Do you think this is going to really work?

Ms. HORN. We believe that, working with the tribal governments and with the Fish and Wildlife Service, we can make it work, and we certainly want to try.

Mr. BREAU. How many, Mr. Bavin, of the artifacts that the Department has actually given out for, quote, religious purposes has the Department actually purchased back from Indians?

Mr. BAVIN. Mr. Chairman, I am not sure of the number. We are not giving out artifacts; we are giving out feathers from birds or whole carcasses of birds. We have been doing this for probably 20 years or more, a long time. It used to be done on a regional basis, and then in the mid-1970's, we centralized this to try to do a better job of getting these eagles, both golden eagles and bald eagles to Indians who had a bona fide religious need. When I mentioned all those pending orders, they include both golden and bald eagles, not just bald eagles.

Mr. BREAU. And some that have sold them back to you.

Mr. BAVIN. We purchased some on one occasion that we had marked.

Mr. BREAU. Congressman Young.

Mr. YOUNG. Thank you, Mr. Chairman. This is going to be a very interesting meeting as we go through it.

How correct was Secretary Watt in 1983 when he stated that 300 eagles were killed each year for their feathers?

Mr. BAVIN. Congressman, we, the Law Enforcement Division of the Fish and Wildlife Service, prepared that estimate for Mr. Watt's testimony. We felt very comfortable with that estimate at that time.

First, we made estimates from Operation Eagle, which was the case that was referred to earlier that centered in South Dakota but expanded into seven other States based on statements made to our undercover agents from defendants, based on statements made to our undercover agents from other people involved in the investiga-

tion that were not defendants, based on observations of our special agents, based on the number of seized birds and birds that were found shot and their tail feathers removed—which indicates they were killed for the feather trade. We estimated that approximately 100 birds a year that we had intelligence on were being killed in South Dakota over a 2- or 3-year period.

We had another case in the Northwest at about the same time—well, actually, it was back in 1981, a couple of years earlier—in which, again, based on this same kind of intelligence information, we estimated that in that part of the country they were killing approximately 100 bald eagles a year for the feather trade. This had gone on for a 6-year period.

In addition, we had, between 1980 and 1982, 94 closed cases involving bald eagles in which, during this 3-year period, we estimated 100 eagles were killed.

So, based on those three sources, three independent types of cases, we estimated that approximately 300 bald eagles were killed each year, and I specify for the feather trade, which is not for Indian religious purposes but for commercialization of eagle feathers. It also expands into many, many other species of migratory birds.

Mr. YOUNG. Have you been able to monitor since 1983, the last 2 years, are you in that process of doing that, also? Is this on the decline or increase?

Mr. BAVIN. Congressman, we have monitored it to some extent. We have not broken another major undercover case since then. We have no indication that it has decreased.

I might emphasize that since 1974, during the last 10 or 11 years, we have had five major undercover cases targeting the illegal trade in migratory bird feathers, and each time we have uncovered one of these nets of individuals. We kept hoping that we would deter the illegal trade. However, as we have put undercover agents back into the market, we find that it is continuing to flourish.

Mr. YOUNG. Now, you are talking about for feathers. Is this between the tribes, or is this some white guy out there killing birds and selling feathers to somebody else?

Mr. BAVIN. These cases are not focused on Indians. I should make that perfectly clear.

Mr. YOUNG. All right.

Mr. BAVIN. What we are focusing on is individuals who are taking and trafficking in migratory bird feathers, including eagles, for profit.

Mr. YOUNG. What is the value of an eagle?

Mr. BAVIN. Well, the eagle, of course, varies depending on whether it is a bald eagle or a golden eagle, and it varies in terms of the size and condition and so on.

During Operation Eagle, the 1983 operation, they averaged about \$500 for a whole bird at the basic wholesale market. But as you move up the marketing chain, for example, a single tail feather will go for \$25 to \$30 per feather, and a whole tail—there are 12 tail feathers in an eagle—a whole bald eagle tail fan will bring in some cases up to \$450.

Then as those are manufactured into artifacts, into headdresses or various things like that, they can bring a substantial amount of money, as much as, say, \$1,000, \$2,000, \$3,000, maybe \$5,000.

MR. YOUNG. Going back to the monitoring now, this bird is put on the endangered species list by the Department. Have you any indications of the amount of birds available in the lower 48? Is that on the increase or decrease, or where are we?

MS. HORN. Congressman, we would like to have Mr. Wallenstrom answer that.

MR. YOUNG. Fine.

MR. WALLENSTROM. Congressman, in 1985, we estimated that we had 1,745 breeding pairs, and in 1981, we had 1,420. That represents an increase of about 81 breeding pairs per year.

MR. YOUNG. Even with the illegal harvesting, we are still making some goals?

MR. WALLENSTROM. Yes.

MR. YOUNG. Just for information, I was down in southern Virginia and found two brand new nests down there that I have not witnessed in the last 10 years, so they are moving south. I want you guys to know that.

MR. WALLENSTROM. We are checking it.

MR. YOUNG. So that is one good sign. So we are still making progress as far as keeping the species in a healthy State?

MR. WALLENSTROM. Yes, we are. I should point out, however, that there are specific populations that have small numbers of eagles that could very easily be jeopardized by the loss of, say, one or two or three or six eagles. If you took the population in the Southwestern United States, for instance, that is a very small population, just beginning to build eagles, and any illegal taking from that population could very easily put it in jeopardy.

MS. HORN. Congressman, if I might point out, too, of course, this is not a static process. In the event that we do find we have been successful in protecting a species, of course, we will proceed to delist it, so that this is a question of monitoring and delisting if appropriate, in which case the protections that we are not talking about are not applicable.

MR. YOUNG. But you only have 1,700 breeding birds, or is that 1,700 breeding couples? Is that birds or pairs?

MS. HORN. I don't think we are prepared to delist that particular species at this point, but I am just pointing out a general trend.

MR. YOUNG. Thank you, Mr. Chairman.

MR. BREAU. Mr. Thomas.

MR. THOMAS. Thank you, Mr. Chairman.

I am just interested to know, when you make these parts from the collection point available, feathers or whatever, for religious ceremonies, how is that done? I mean, who qualifies? You answer that first and then let me ask you the next part of the question.

MS. HORN. Mr. Bavin, would you answer that, please?

MR. BAVIN. An individual Indian can apply to our regional office with a particular form certifying that he or she is a member of the tribe and qualified to practice a particular religion that requires an eagle or a portion of it, in which case then it has the sanction of the tribe. The application is sent to our Pocatello office and put in a priority order to be filled.

Mr. THOMAS. What kinds of checks do you make to see and follow up? We understand that you reacquire some of them, but how far do you go to following up to see if the proper use is being made of these parts or not?

Mr. BAVIN. Basically, not at all, sir.

Mr. THOMAS. Not at all.

Mr. BAVIN. Unless we happen to encounter it in trade or we have a particular subject who we have reason to believe is trafficking in them.

Mr. THOMAS. The point I am getting to—and I think you just answered it—is that these parts can very well wind up in the trade.

Mr. BAVIN. They can, but I don't want to give the impression that this is a normal thing. I am just pointing out that it has happened, in answer to the chairman's question, but it is not routine, particularly.

Mr. THOMAS. Have you made any estimate, if there were a provision to allow—I mean, of course, it is going on now—but has your department extrapolated what would really be the legitimate take of eagles across the country for religious purposes if that provision were provided? This question might have already been answered; you might have touched on it.

Mr. BAVIN. Well, I can only state that, under the Bald Eagle Act, we have not allowed, to my knowledge, any permits to take bald eagles for religious purposes since the passage of the act or at least for many, many years, since the Bald Eagle Act became effective.

Mr. THOMAS. Let me pose it differently. If you did, what would be your estimate?

Mr. BAVIN. Oh, I wouldn't have any estimate.

Ms. HORN. Congressman, I don't think we really could estimate that at this time.

Mr. THOMAS. No way? All right. Thank you.

That concludes my questions, Mr. Chairman.

Mr. BREAU. I would like you to tell me about the extent of the *Dion* decision. In all of the other Federal circuit courts around the United States other than the eighth circuit, if an American Indian were to take a bald eagle in those other circuits and said that it was being taken for religious purposes, would the *Dion* decision extend to those circuits, or is the law different in all of the other circuits in the United States?

Ms. HORN. We believe that the *Dion* decision is limited to the eighth circuit at this particular point.

Mr. BREAU. What would the *Fryberg* case and others similar to that stand for in circuits other than the eighth circuit?

Ms. HORN. Well, the *Fryberg* case, of course, is a ninth circuit case, and we don't have rulings in any of the other circuits specifically on point, although we do have at least one State prosecution pending in the State of Florida.

We believe that the ninth circuit would rule differently than the *Dion* court did on the abrogation of treaty rights issue and would allow the Endangered Species Act to be applied to reserved hunting rights in that jurisdiction.

Mr. BREAU. Well, in the Department's enforcing of the Endangered Species Act, would you allow for any taking of eagles in other circuits for religious purposes?

Ms. HORN. Not across the board, sir.

Mr. BREAU. And under the board, on top of the board? [Laughter.]

Yes or no? One eagle, two eagles, no eagles, what?

Ms. HORN. No, we would enforce the Endangered Species Act.

Mr. BREAU. Which would not allow the taking of any eagles for religious purposes in those other areas?

Ms. HORN. That is correct.

Mr. BREAU. What about birds of other species than the bald eagle? Suppose a whooping crane, for instance, landed in the eighth circuit, and an American Indian took the whooping crane and said, he was taking it for feathers for religious purposes?

Ms. HORN. Well, the *Dion* case did specifically extend its holding to the Endangered Species Act, so we believe that we would have the same kind of holding with respect to a whooping crane, since it is an endangered species specifically listed as such.

Mr. BREAU. Well, the point of the question is, how much are you going to look at the defense of religious taking? If someone just says, "I take whooping cranes for religious purposes," is that enough? What would they have to show?

Ms. HORN. Why don't I let Mr. Vollman answer this question, if I could?

Mr. BREAU. How about an American alligator when it was on the endangered species list?

Mr. VOLLMAN. We don't think the *Dion* decision really stands for the proposition that the religious purpose in taking an endangered species is what is protected. What *Dion* appears to stand for is that a treaty-reserved hunting right is not affected by the Endangered Species Act, and in the case of eagles, the circuit held that a commercial taking is not protected by the treaty, but one needs to look to the treaty to determine the scope of the right. That is the ruling of the *Dion* decision.

Mr. BREAU. Well, then, they would be able to take whooping cranes in the eighth circuit if they were not selling the parts or selling anything of the whooping crane?

Mr. VOLLMAN. If there were a treaty-reserved hunting right for the taking of any species on a given reservation, then technically it would be applicable to whooping cranes, though I have not heard that Indians have been killing whooping cranes. But technically, the *Dion* decision would be applicable to that, and presumably, an Indian defendant could invoke a treaty-reserved hunting right.

Mr. BREAU. So it is the opinion of the Department that in the area that is affected by the *Dion* case, that case would allow a Native American Indian to take any endangered species as long as that species is not taken for the purpose of commercial purposes?

Ms. HORN. If, indeed, that were included in their original treaty rights.

Mr. BREAU. Well, I would imagine most treaty rights protect hunting rights, so it would stand for the proposition that they could hunt any endangered species as long as that species is not being sold.

Ms. HORN. We would have to look to the specific treaty, I think.

Mr. VOLLMAN. Yes, we have to look to the treaty.

Mr. BREAU. Well, assuming the treaty says that they have hunting rights on the reservation.

Mr. VOLLMAN. If they do, then presumably it would apply to all species unless it were specific, yes. But not all reservations are affected by treaties.

Mr. BREAU. What about if the population of salmon or steelhead were listed as endangered? Under current law, would there be any provision that would allow for the taking of that species for traditional purposes outside of the Eighth Circuit?

Ms. HORN. I am going to ask Mr. Barry to answer that question, please.

Mr. BARRY. Mr. Chairman, I suppose the answer to that question would be dependent upon what the nature of the specimen of salmon's listing was. If it is listed as a threatened species—

Mr. BREAU. Endangered.

Mr. BARRY. OK; tough case. Tougher case. In the case of an endangered salmon, we would not have the ability at present, under the Endangered Species Act, under section 10, to issue a permit for religious purposes.

Mr. BREAU. Suppose it is not for commercial taking, just for utilization by the tribal members?

Mr. BARRY. We still would not be able to do that.

Section 10 is fairly specific on the purposes for which an endangered species permit can be issued—things like scientific research or propagation or enhancement of survival—and unless it falls into one of those very, very narrow categories in section 10(a), we don't have the authority to issue a permit.

Mr. BREAU. Within the eighth circuit, you would follow the *Dion* case, which would allow the taking if it is not for commercial purposes?

Mr. BARRY. We would have no choice but to follow that as the rule of the circuit.

Mr. BREAU. The other issue that we need to look into is the suggested amendment by the Department which would provide that Native Americans are in fact covered by the provisions of the Endangered Species Act, but that there would be a section that would permit the taking of listed species by Native Americans for bona fide religious purposes, but only if such taking is not likely to jeopardize the continued existence of such species.

Obviously, those few words, "if it doesn't jeopardize," are going to be very difficult to enforce. How many bald eagles are going to be taken before it becomes a jeopardy problem? How are you going to follow up as to whether it is taken only for religious purposes or if it is somehow finding its way back into commerce?

How many bald eagles would you say we lose for accidental reasons, lead shot ingestion, lead poisoning, powerline accidents, or other reasons, approximately?

Ms. HORN. We will ask Mr. Wallenstrom to answer that question, please.

Mr. WALLENSTROM. We do not have an exact count. What we have done is monitor the birds that come into our Madison National Wildlife Health Lab, and over a 22-year period, they have received some 1,442 birds under all of those categories. We estimate that this represents about one quarter of the total loss. So you

could divide that by 22 and multiply by 4 and figure that we are losing about 260 birds a year.

Now, what percentage of the total loss they receive is speculation. We know that, for instance, the birds in the law enforcement cases discussed here never were turned in to the Madison lab, and of course there are many other birds that are not picked up.

Mr. BREAUX. Do you have it broken down as to how many would be killed, say, by lead shot poisoning?

Mr. WALLENSTROM. Well, all poisoning would represent about 11 percent of that total, and if you break that into a 1-year period, that would be about 28 birds.

Mr. BREAUX. And what is being proposed to try to correct that problem?

Mr. WALLENSTROM. We are identifying the lead shot areas around the country and are proposing the use of steel shot in those areas. In 1 year, we will be changing the hunting regulations to require steel shot or we will keep the closed to migratory bird.

Mr. YOUNG. Will the gentleman yield just for one moment?

Mr. BREAUX. The gentleman from Alaska?

Mr. YOUNG. I am curious. Does the eagle receive the lead shot from prey that they eat?

Mr. WALLENSTROM. Yes, that is correct.

Mr. YOUNG. So what you are talking about is an eagle in a refuge area probably eating a duck that has lead poisoning?

Mr. WALLENSTROM. Yes, a duck that has lead pellets in its flesh.

Mr. YOUNG. You are not talking about .22 caliber lead shot or anything like that? You are talking about lead shot consumed.

Mr. WALLENSTROM. Yes.

Mr. YOUNG. I just wanted to make sure.

Mr. BREAUX. Mr. Thomas.

Mr. THOMAS. Mr. Chairman, if I might, I would just, for my own edification here, like to pursue one or two things about the eagle. What is the average lifespan of a bald eagle? Twenty years?

Mr. WALLENSTROM. I am afraid I cannot answer that.

Ms. HORN. If we can provide that for the record, sir, we will.

Mr. THOMAS. Yes, I would like to know.

[Material to be supplied follows:]

LIFESPAN OF THE BALD EAGLE

In the wild, approximately 10-15 percent of hatched bald eagles may survive to adult plumage (usually about 5 years). Those that reach that age can be expected to live another 10-15 years. In zoos, bald eagles may live to more than 30 years of age.

Mr. THOMAS. To what extent is a bald eagle migratory? At all stages of his life or in the early years?

Mr. WALLENSTROM. It is migratory annually.

Mr. THOMAS. Throughout its life?

Mr. WALLENSTROM. Yes.

Mr. THOMAS. So it does not become a permanent resident at some point of any area?

Mr. WALLENSTROM. That is correct; it does not.

Mr. THOMAS. It is subject to migrate. All right.

We all know the capabilities of a modern high-powered rifle with a telescopic site, but how will most of these eagles be taken if they

were being taken for religious purposes? What is the most effective and efficient method?

Mr. WALLENSTROM. I believe shooting with a shotgun would be the largest percentage of the take for illegal purposes.

Mr. THOMAS. Well, obviously, if you are going to shoot one with a shotgun, you have got to get pretty close. Would the accepted method be baiting, or would they be shot on nest or around nesting sites?

Mr. WALLENSTROM. I believe Mr. Bavin would be able to answer that.

Mr. THOMAS. I am sorry; I didn't hear you.

Mr. WALLENSTROM. I would like to turn that over to our law enforcement people.

Mr. THOMAS. I am just trying to establish if there is a pattern here that might tell us that these eagles that would be taken are not just eagles but maybe even more often taken around nesting sites, which would make, to me, the taking of the eagle even more deplorable.

Mr. BAVIN. Well, I am not sure I understood. The first part of your question, I thought, was if they were being taken for religious purposes under one of these permits, how would they be taken?

Mr. THOMAS. The killing of the eagle, period, regardless, if he is going to be shot. I have a lot of doubt about why he is being shot.

Mr. BAVIN. In Operation Eagle, there was a wintering concentration of birds in and around the Karl Mundt National Wildlife Refuge, so there were more of them there at a given period of time. Therefore, it was much easier to take one with a shotgun.

Mr. THOMAS. To me, I was just looking for a pattern that might say that not only—if this were the accepted thing and this were allowed to occur—would you be taking eagles, but you would be taking eagles that might be at the most productive span in their lives, migratory habits where they would gather or birds that were actually nesting and reproducing or that had established themselves, and I think that has some significance on it, in my own way of thinking.

Thank you for your questions.

Mr. BREAU. Mr. Miller, do you have questions?

Mr. MILLER. Yes. Congressman Lowry could not be here this morning and requested that I ask two questions.

First, for Ms. Horn, why do you wish to include, "tribal governments" under the definition of "person," since that would appear to violate the tribe's sovereign immunity?

Ms. HORN. We don't believe that we would be violating sovereign immunity. We believe that we can work with the tribes to effectively weave a path between the two competing needs here.

We believe that our best course is to work with the tribal governments to establish what is truly a need for religious purposes, and we also believe that the requirements and needs of the ESA need to be conscientiously followed.

Mr. MILLER. The second question is for Mr. Vollman. Do tribes normally practice separation of church and state? That is, do tribes as governments even deal with religious takings?

Mr. VOLLMAN. Some tribes do, and many tribes have governmental structures that do provide for a separation of church and state

which, as our testimony points out, makes it all that much more important for the Department to work with tribes and religious leaders in identifying these concerns.

Mr. BREAUX. I think that probably concludes all the questions from the members. I want to thank you, Ms. Horn, for your testimony and for the support from your colleagues.

I know that we would like to continue to work with the Department as we move forward with legislation dealing with this particular issue. Thank you very much for your appearance.

Ms. HORN. Thank you, sir.

Mr. BREAUX. I would like to welcome up at this time a panel of Native American representatives: Ms. Suzan Harjo, executive director of the National Congress of American Indians; Mr. Merle Garcia, governor of the Pueblo of Acoma; Mr. Douglas Endreson, attorney at law, representing the Devils Lake Sioux Tribe and Assiniboine and Sioux Tribes of Fort Peck Reservation; Mr. Billy Frank, chairman of the Northwest Indian Fisheries Commission; Mr. Gilbert Pena, chairman of the All Indian Pueblo Council; and Mr. Ivan Sidney, chairman of the Hopi Tribe.

I think we have enough chairs to get six up there if we can just kind of spread them out. Ms. Harjo, we have you listed first. If you would like to go ahead and present your testimony, we would be pleased to receive it.

Ms. HARJO. With the committee's indulgence, I would like to defer to my—I don't know if they would appreciate being called so—my elder Indian leadership here, and ask Mr. Garcia if he would make a presentation here.

Mr. BREAUX. Sure. Mr. Garcia, we will take your testimony first.

STATEMENT OF MERLE L. GARCIA, GOVERNOR OF THE PUEBLO OF ACOMA, NEW MEXICO, ACCOMPANIED BY DAVID L. GARCIA, SPIRITUAL LEADER; AND JUANICO SANCHEZ, CACIQI TRIBAL LEADER

Mr. MERLE GARCIA. Thank you, Mr. Chairman, and good morning.

Mr. Chairman, my name is Merle L. Garcia. I am the Governor of the Pueblo of Acoma, NM. I represent a proud and traditional tribe of about 3,800 people. We have inhabited the village of Acoma since 600 A.D. Acoma is the longest continuously occupied site in all of North America.

Mr. Chairman, I would like to thank you for the opportunity to testify here today. As I stated in my letter to you on May 28, 1985, which I submit as a matter of record, an open hearing process where the views of tribal and traditional Indian religious leaders can be heard is the best way to address the issue now before the subcommittee.

Mr. Chairman, we feel very strongly that your proposed amendment to the Endangered Species Act would prohibit the Acoma people and other Native Americans from practicing their religion in the immediate future and for generations to come. This could result in the loss of our spiritual heritage.

Mr. Chairman, I cannot overstate to you the importance of eagle feathers in the practice of our religion. Eagle feathers to the

Acoma people are the moral equivalent of the Bible as an instrument of prayer, as I stated in my letter to you. Other Indian peoples, particularly the Pueblos of the Southwest, share this view.

The proposed amendment would deny Native Americans the right to hunt for eagle feathers and infringe on our religious freedom, which is guaranteed under the American Indian Religious Freedom Act and the United States Constitution. This is not an acceptable solution to the legitimate environmental concern of protecting eagles.

Native Americans are, in fact, this country's first environmentalists. We know that there must be a balance between the protection of our national bird and our religious rights. However, Native Americans are not the cause of the eagle becoming an endangered species. There has not been an eagle killed on Acoma land for at least the last 5 years. Indeed, our interest is in preserving eagles in large part because of their importance to our religious practices.

Furthermore, at the present time, we do not have an immediate need to kill eagles because our religious leaders through the generations have learned how to preserve eagle feathers for our religious needs. However, we do strongly object to legislation which would legally preclude us from ever hunting for eagle feathers, which are so essential and central to our religious beliefs.

We also wish to note that our right to take and use bald or golden eagles for religious purposes is already subject to regulation by the Secretary of the Interior, who has the authority to issue permits for such purposes. We see no need for further amendments.

To underscore the importance of this issue to us, I have brought two religious leaders with me, first Mr. David L. Garcia, a spiritual leader.

[Mr. David Garcia made a statement in his native language.]

Mr. MERLE GARCIA. Mr. Chairman, I would like your indulgence here. They will testify in my native tongue, and I will try to interpret for them.

Mr. BREAUX. That is fine, but I have one, two, three, four, five, six, seven, and the last witness is not even at the table. So it is going to be under the same time constraints, Mr. Garcia.

Mr. MERLE GARCIA. I realize that, Mr. Chairman, but I will try to stay within my time limits to have their say-so in our native tongue, because it is also very important to other Indian leaders that religious leaders should be given the opportunity to testify before you, Mr. Chairman.

I will stay within my time limits. If you will bring me to note that my time is up, we will cut them off.

[Mr. David Garcia made a further statement in his native language.]

Mr. DAVID GARCIA. [as interpreted by Mr. Merle Garcia]. Mr. Chairman, I am grateful that you have allowed us, as tribal religious leaders, to testify before you. I would like to start off by saying that eagle feathers, to Indian people, especially where it concerns religion, are very, very important.

Not only is the eagle feather used for praying for Native Americans; it is also used to pray for people in all walks of life, for this country's prosperity and peace and for pursuing all the things that are good to human beings.

Thank you very much.

Mr. MERLE GARCIA. A member of the Caciqi, a religious and tribal leader, Mr. Juanico Sanchez, is also with me today.

[Mr. Sanchez made a statement in his native language.]

Mr. SANCHEZ. [as interpreted by Mr. Merle Garcia]. Thank you, Mr. Chairman. I am proud to be back here testifying before you.

As a Caciqi and tribal leader of my Pueblo, I strongly urge you to withdraw your amendment on the endangered species, especially the eagle feathers. It is a true heritage of my people that they have brought to this country when they migrated into this country.

Eagle feathers and the wood for making prayer sticks are very, very essential to us. Hopefully, by withdrawing your amendment, it will give my young Acomas the opportunity to practice their religious beliefs.

Mr. MERLE GARCIA. Mr. Chairman, although Mr. Tony Chino, a medicine man and a kiva father, was not able to be present, I urge his letter to be included in the record along with his testimony.

[Material follows:]

JUNE 5, 1985.

RE Legislation Potentially Affecting Indian Religious Practices.

Hon. JOHN BREAUx,

Chairman Subcommittee Fish and Wildlife Conservation and Environment, U.S. House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR HONORABLE BREAUx: This is a letter to implore the reconsideration of passing an amendment to abolish the use of eagle feathers by Native American Indians.

The use of eagle feathers in religious ceremonies by Native American Indians is a heritage passed on generation after generation much as the practice of passing on the holy bible or a menorah for the purpose of worshiping deities or gods.

Eagle feathers are not taken for granted by my people, the Acomas of New Mexico and the many other pueblos, nineteen total in the State of New Mexico. It would not be possible to have religious ceremonies because the eagle feathers are an integral part in preparing offerings to our spirits and our gods.

We use the feathers in many ceremonies, too numerous to list, but I will only mention a few of the more important use of this sacred bird.

1. The Eagle feathers from the backside or underside are used with other feathers to make an important offering for the health, safety, well being, security of our people and to protect the land, livestock and domestic animals. This is also used to ensure rain, good weather and prosperity for the land.

2. The wing tips are used for the blessing of the sick, the unhealthy and for the assurance of safety from the elements of pestilence, poverty, enemies or hardships.

3. The wings and tail feathers are used to complete the masked dancers which are also important to our well being. The down feathers are used to signify a new beginning in a cycle of life where commitments are an integral part of sustaining a heritage unique among Native Americans.

4. The use of all parts of the Eagle are used in religious ceremonies across the United States from east to west.

The eagle or any of the sacred birds are not disposed of in a trash can or thrown away after the feathers or parts are removed. They are given a burial with a prayer so that more will live and that the spirit as well as the reincarnation of the eagle may happen.

It is a sad situation when the feathers of this magnificent bird is exploited to satisfy the greed of some Indians whether he or she is an Indian.

The consequences of selling for personal gain should be enforced legally as well as by spiritual reproach.

Incidentally my age is 30 years old and I have been a medicine man for 11 years and Head Kiva father for 5 years. It would be a sad fate if eagle feathers or the feathers of predatory birds are outlawed.

I implore you to consider the fate of all Native Americans which will be affected by this important decision.

Respectfully yours,

TONY B. CHINO,
Medicine Man/Kiva Father.

PUEBLO DE ACOMA,
Acoma, NM, May 28, 1985.

Re Objection To Amendments Introduced That Would Interfere With The Free Exercise Of Native American Traditional Religious Use Of Eagle Feathers.

Hon. JOHN B. BREAUx,

Chairman Sub-Committee Fish and Wildlife Conservation and Environment, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, 2113 Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: This letter is for the purpose of strong objection from the Pueblo of Acoma on the amendments to the endangered Species Act, which was proposed in the mark up session on May 2, 1985. The Pueblo of Acoma respectfully urge you, Mr. Chairman, to set aside the amendments on behalf of all the Indian Tribes, because the proposed amendments, which would include Indians and Indian Tribes within the definition of "Person", would impose regulatory restrictions on the practice of Native American Religions, and which are not consistent with existing law and policy, therefore, it would cause a great deal of hardship for an already overburdened segment of American Society.

The United States Congress in 1978 passed the American Indian Religious Freedom Act clarifying national policy and attempting to bring Indian people the full protection of the United States Constitution in regards to religious practices. The Act mandated the President of the United States to report to Congress the results of any evaluation undertaken in consultation with the Native American religious leaders concerning administrative and legislative changes considered necessary for the protection and preservation of religious and traditional rights and practices of the American Natives. In 1979, the mandated report was transmitted to the United States Congress, and since that time Congress has failed to act on any of the recommendations.

Since that time, only one hearing has been held on the subject and this was in 1982 by the Sub-Committee on Civil and Constitutional Rights of the House Committee on Judiciary.

A report was made in 1979 by the United States to the world Community of Nations that the Native American Governments were covered under the principles concerning self-determination and human rights, stating in respect to freedom of religion.

The religious practices of the American Indian are an integral part of their cultural and traditional heritage and forms the basis of Indian identity and tribal governments. To guarantee the rights of Indians in this regard, the American Indian Religious Freedom Act was signed into law in August, 1978.

The Act proclaims that it is the policy of the United States to protect and preserve for the American Indians their inherent right of freedom to believe, express and exercise their traditional religion; including, but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonies and traditional rites.

The Pueblo of Acoma, objects specifically to the potential amendments for the following reasons:

1. Tribes are inherently sovereign governments by treaty and other formal relationships with the United States and recognized as such in the federal law and policy.

2. The United States Constitution protects all religions against federal regulations, including American Indian Religions.

3. It is the stated policy of the United States in the American Indian Religious Freedom Act of 1978, to move not impose, barriers that stand in the way of the free exercise of traditional Native American Religions.

4. The amendments would subject Indian people to restrictions against the free exercise of traditional religion, perhaps causing damage and undue hardships and resulting in myriad constitutionally based lawsuits.

5. The administration inspired amendments, constitute a back door effort to inappropriately interfere with ongoing litigation, without any consultation with its own officials who are charged with administering Indian affairs.

6. There has been no consultation with tribal or traditional religious leaders regarding this issue of such vital interest to so many tribes.

7. The sub-committee has not consulted with the members of the House who are most directly involved and are knowledgeable of American Indian religious freedom issues.

8. The sub-committee has not looked at this legislation in light of settled law and policy respecting the ceremonial use of eagle feathers. Tribes and individual Indians

in the Southwest have not been given the opportunity to an open hearing process to consider the impact of the potential amendments.

I have been told that Indians cannot expect to take the last of the endangered species and that there has been an open process that the Department of the Interior even testified on this subject.

In the first instance the Indian people have a vested interest in protecting the endangered species because many are so integral to our religions.

You must recall that the non-Indians, not Indians, destroyed the Buffalo and nearly destroyed the Eagle population. The Department of Interior's involvement in a matter before Congress on an Indian issue is insufficient to fully assess the impact of an action on Indian policy and Indian lives.

The Indian people of this country, especially the Pueblos in the Southwest, consider the Eagle feather a Bible, just as the non-Indian consider the book of the church a holy bible from which they pray. The Eagle feather may not have any writing to pray from, our ancestors have already set the stage long before 500 A.D. and since that time, we (The Pueblos) have practiced our religion in that way.

The United States Constitution tell us that treaties are the Supreme Law of the Land and that Congress deals with Indian Tribes.

It does not tell us that our ancestor's treaty understanding are beside the point or that the Interior Honorable Breaux.

Department's Lawyers for Fish and Wildlife can represent our interests before Congressional bodies.

The sub-committee staff persons, also, stated that in connection with ongoing litigation, that Congress can do anything it wants. Some people in Congress may feel that they can do anything they want in regard to Indian people and Indian governments. This may be other Nations' system of Government, but the Pueblo of Acoma had not thought that this was the American system of administering justice.

The Pueblo of Acoma urge you to address this issue, through consultation and hearing processes with tribal and traditional religious leaders in an effort to arrive to a solution.

Thank you.

Sincerely

PUEBLO OF ACOMA
MERLE L. GARCIA,
Governor.

MR. MERLE GARCIA. Mr. Chairman, for these reasons and in view of other arguments on the record, we strongly urge you to withdraw your amendment to the Endangered Species Act.

I thank you very much, Mr. Chairman, for your time and attention. Thank you, sir.

MR. BREAUX. Mr. Endreson?

MR. ENDRESON. Mr. Chairman, with your indulgence, I would defer to Mr. Frank, to my left.

MR. BREAUX. Mr. Frank.

STATEMENT OF BILL FRANK, JR., CHAIRMAN, NORTHWEST INDIAN FISHERIES COMMISSION

MR. FRANK. Thank you, Mr. Chairman.

My name is Bill Frank, and I have appeared in front of this committee several times before and will continue to appear for the next, hopefully, 55 more years.

Mr. Chairman, my dad died 2 years ago at 104, and I plan on being here at least another 50 years, hopefully, and hopefully we can come here to Congress to try to help and understand the native people of this Nation and certainly the native people of my Northwest, that we have eagles and salmon and plants and different species up there that seem to be in trouble right now, and we are trying to regulate and enforce some of these species with better enforcement and better regulations.

We have several species of salmon that are not in the endangered species list, and they are 90-pound chinook salmon that I don't have on the Nisqually River any more, spring chinook salmon. These salmon have disappeared over the years, and not very long has it been that they have disappeared.

The Federal Government and the State of Washington and other States have been regulating the Indians out of business and out of the plan for the last 100 years, and we are saying that we would like to be in this plan, even though the species are disappearing and our way of life, hopefully, is not disappearing, but we have been planned out of this, the regulating communities around us.

Whenever the State of Washington or the Federal Government get to the reservation, they plan around us or over the top of us, one of the two. I think there is a better way of planning and working together with the tribes. I believe that the spring chinook salmon, if looked at, could be brought back to that country.

I believe that the eagles that have been in bad shape along the Nisqually River and the Northwest country have come back and have come back through better regulations, Federal regulations and State regulations and tribal regulations. I think they are not plentiful, but we see them coming back, working with Fish and Wildlife on some of the studies that we have going on those drainages out of the Cascade and Olympic mountain ranges.

I believe working together is going to solve some of these problems. I came back here—and I will be back here next week—on an abrogation bill that is going through the United States Senate, and I have been back here in 1980 on another abrogation bill. I think that is not the way to do things.

I hope that the day has gone by when someone does not run to Congress and say, Write or amend something that is against the Indian people, whether it is their religious practices or their way of life. I hope that day is going to be gone.

We continue to come to Washington to try to better understand, to make you better understand us, the people of the Northwest. I cannot speak for the Indian people in the Southwest that have their own religious meanings of different animals down there.

I fish along the Nisqually River. I see eagles every day, and they are a significant meaning to me. I cannot tell you what that means. But I don't see that eagle in the wintertime, I wonder where he has gone. He brings luck to the Indian people along that river. We talk to that eagle, and we feed him, and he understands us, and we understand him, and we try to live together.

You take the bowhead whales in Alaska and the native people up there. Where are those bowhead whales going? The native people up there are being regulated out of the bowhead whales. They are now drilling oil out in their nursing grounds. What is happening to our country?

The spring chinook salmon, they have built dams on our river. There has got to be a better way to plan things. There has got to be a better way to make sure that those endangered species are going to be here for the next couple of thousand years. There has got to be a better way for you and me to work together.

I believe that we can have better enforcement, we can have better education, we can have better regulations, tribal regulations

and, I think, State regulations and Federal regulations. We can have workshops. We can understand each other better.

I would like to see us set up some kind of regulatory body to understand each other a little bit better, rather than to have somebody come to Congress and say, let's write an amendment against the Indian people.

We need the environmentalist people. We need the United States. We need the Federal Government. We need each other to keep this country intact. I need the corporations in the Northwest, and I need the business communities and the ports. I need to work with the county commissioners. We have coalitions formed in the Northwest to do just that. I hope that we stand ready and committed to do exactly that.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF BILL FRANK, JR.

Mr. Chairman, members of the Committee, my name is Bill Frank Jr. I am a Nisqually Indian, the chairman of the Northwest Indian Fisheries Commission, the inter-tribal coordinating entity for western Washington treaty fishing tribes. I am pleased to be here today to testify on two subjects of immense importance to Northwest Indians, the protection of endangered species and the protection of American Indian treaty and First Amendment rights.

The importance of protecting the fish, animals and plants that are a part of Indian life is great beyond the bounds of measurement because these living things are interwoven with our own lives. Whenever in a particular location or region a species with treaty or religious importance to an Indian band or group is destroyed, we are the ones who most feel the loss.

In my lifetime I have experienced and witnessed many of these losses. Each of them was caused by nonIndian actions, desires and development, and not one of them would have been prevented or helped by the amendments which this committee has proposed. The great spring chinook salmon runs on my river—the Nisqually—used to enter the river at just this time of the year. On the Elwha river the spring salmon used to weigh upwards of ninety pounds or more. They are gone now, not because Indians caught them for our spring ceremonies, but because dams were built on those rivers fifty years ago, and the spring salmon beat their heads against the cement walls of those dams until the water turned red, just trying to get up the river to their summer holding areas and spawning grounds. Some of the roots and plants we depend on for our ceremonies and medicines are gone, too, at least from our local areas. We have to gather them now from far away places, sometimes as far away as out of the Country. They're gone not from Indians digging and picking them, but from nonIndian developers and loggers cutting down the forests, bulldozing the prairie, and poisoning pests.

Great bald eagles are fairly plentiful in our area now, after new state and federal laws and tribal actions forced the protection of eagle nest trees and stopped the poisoning of small animals and plants, and since Indians and the state began to cooperate in bringing back the eagle's food, salmon, to all of our river systems in the northwest. As we have learned in the northwest, the only true and lasting protection for fish and wildlife comes from *cooperation*—between Indian tribal and religious groups and industry, among environmentalists, states, Indians and industry, and with the United States government.

We have had nearly 100 years of the state and federal governments finding solutions to fish and wildlife problems by regulating the Indians out of the picture, and it has not solved one fish or wildlife problem. It has led to more than eighty years of federal court litigation, however, and has otherwise contributed to making the problems worse while leaving untouched the real problems afflicting our resources. From a lifetime of work on conservation and 11 years of work with tribal, state, federal and industry leaders I know the key to protecting the fish and wildlife resources of the Northwest is *cooperation*—cooperation and the commitment to work together to solve the problems. The key is not to regulate the Indians or to infringe our treaty rights and religious freedoms.

I strongly oppose the amendments which have been considered by this Committee for two reasons. First, it would define "persons" under the act to include Indian

tribes. This would strip Indian tribes of their sovereign immunity, directly attacking the status of tribal governments and potentially punishing whole tribes for engaging in traditional religious practices. This violates the solemn treaty commitments the United States made to Indian tribes, and the religious freedoms secured to Indians under the First Amendment to the Constitution. On the other hand, I can foresee no gain or benefit whatever for fish or wildlife protection from defining persons to include Indian tribes.

Second, the amendments would have the Secretary of the Interior investigate American Indian religions to determine if the taking of a particular species was, in *his* view, a valid part of the religious practice, and then would regulate any take he deemed was appropriate. This violates two fundamental values in the United States Constitution. The first value is found in the Establishment Clause, which forbids the government from establishing religions. This would be violated by providing that the Secretary investigate and regulate the religion through the religious practices having to do with fish and wildlife that he, for whatever reason, decides to put on some list. The second value that is violated is that found in the First Amendment to the Constitution, which guarantees freedom religion to all Americans. The American Indian Religious Freedom Act makes it perfectly clear that American Indian religious practices are among those protected under the Constitution.

To solve the problem with explicit legislative language, the Committee first has to understand and identify the *real* problems for these species, problems that have to do with nonIndian development, industry, and sports activities. Then the Committee must articulate the objective of the protection. As the Ninth Circuit Court of Appeals has said in our northwest fishing cases,

Conservation, properly understood, embraces procedures and practices designed to forestall the imminence of extinction. Preserving a "reasonable margin of safety" between an existing level of stocks and the imminence of extinction of the heart and soul of conservation.

United States v. Oregon, opinion of October 12, 1983 (9th Cir.). I hope that is your objective; it is the objective of Indian tribal and religious leaders, and indeed Indians in general. Today, in most parts of the country, tribal rights are among the most powerful forces available for the protection of any threatened or endangered species. The Committee should look at how to work with Indians and Indian tribes to provide for the protection of species used by Indians, instead of trying to regulate Indians out of their religious freedoms and treaty rights.

Instead of the approach you have considered and on which you are holding these hearings, I would like to recommend that you adopt an approach of cooperation, recognizing that Indian religious practices and treaty rights are consistent with your conservation intentions and that cooperation is the most effective means to accomplish your purposes. The alternative I suggest is that you acknowledge, in the legislative history or perhaps the bill itself, that when a species is identified in a region as being threatened or endangered, the Secretary of the Interior shall work cooperatively with Tribal governmental and Indian religious leaders, and with any affected industry, development or interests with impacting activities or practices, to facilitate appropriate protection and allow a reasonable margin of safety between existing levels of the species and the imminence of extinction, without impacting Indian religious freedoms and other treaty rights.

I and other northwest tribal leaders stand ready to work with you, and with industry and environmental groups, in understanding and developing a more realistic and cooperative approach to this subject along the lines we have suggested.

Thank you for asking me here today. I will be pleased to answer any questions you may have.

Mr. BREAU. Thank you.

Mr. Endreson.

Mr. ENDRESON. With the Chair's indulgence, Mr. Sidney, chairman of the Hopi tribe, will testify next.

Mr. BREAU. I am just going to ask who wants to go next, Mr. Sidney?

STATEMENT OF IVAN SIDNEY, CHAIRMAN, HOPI TRIBE

Mr. SIDNEY. Thank you, Mr. Chairman.

My name is Ivan Sidney. I represent the Hopi Indian Tribe in northeastern Arizona. I want to thank you for allowing me to testify this morning.

Mr. Chairman, the Hopis have been concerned about conservation for centuries before the coming of the white man. Therefore, we are pleased that this committee is also concerned about these issues.

These issues affect our religion, which is most important of our culture, and to have the extinction of such a thing as the eagle would be an extinction of ourselves because our religion is based on the eagle.

We are here today because we are concerned about the long-range effects on anything that deals with our culture. However, we also know that our religion is protected in the U.S. Constitution, which we are talking about here today.

Speaking for the Hopi, we do not feel that this amendment has had sufficient review and study by the Indian people. It is too important an issue for us to act quickly on this issue.

We encourage the committee to hold more extensive hearings, possibly field hearings, so that our traditional and religious leaders can participate and fully discuss the religious implications of the proposed amendments.

I also would like to share with the committee that I represent the Hopi, and we have a lot of young people who are beginning to become better educated. But we continue to leave with our people, although we have formal education, the wisdom of our elders. I feel that we share with them the implications of this amendment.

I feel pretty sure we can address the conservation concerns that we also have as Hopi people. I represent a village which is known as the continuous inhabitant in this continent, the town of Old Aribi. Mr. Chairman, I would like permission to submit a written statement, and I thank you for allowing me to testify this morning. Thank you very much.

[Prepared statement of Mr. Sidney follows:]

PREPARED STATEMENT OF IVAN SIDNEY

Mr. Chairman and members of the subcommittee, my name is Ivan Sidney and I am the Chairman of the Hopi Tribe. I thank you for giving me the opportunity to appear before you while you are considering an issue of such vital and traditional importance to the Hopi and many other Native American tribes.

This subcommittee is considering including "members of Native American tribes" in the definition of "person" within the Endangered Species Act. Although this Act never specifically excluded Native Americans from its provisions, we always presumed tacit exclusion by virtue of the fact that our First and Fifth Constitutional Amendment rights would have otherwise been abridged.

But I have no desire to address actions which you are presently contemplating, from a legal standpoint—I believe the lawyers can do a better job at that than I. Instead, I would like to provide you with some grass roots insights: as a Native American residing on a reservation; as a member of a tribe that holds dear its traditions, language, values and religious practices; and as the elected leader of a people that could be severely hurt by any adverse legislative measures which you might here undertake.

Yes, it is true that the Hopi take eagles. These birds are indispensable to some of our religious ceremonies, around which, in turn, our religion itself revolves. And our religion is, after all, all important to our culture. But it is *not true* that we are unconcerned over the possible extinction of eagles and other such endangered and threatened species. Precisely because these birds and certain other such animals are such an integral part of our religious practices and without which we could not con-

tinue to adhere to our religion, which dates back more than a thousand years, does it not stand to reason that we have a greater vested interest in the continued existence of these species than that of even the most ardent environmentalist or ornithologist?

It had been said by some that Indians are not conservationists. I would respectfully remind this Subcommittee that our ancestors not only lived off the land, but depended upon its bounties to provide them with food, shelter and medicine. Many animals were revered, others respected as both a source of food or clothing, or as formidable enemies from which it was preferable to maintain a prudent distance. We were therefore imbued with, and continue to teach our children, love of the land and reverence and respect for its flora and fauna. How can anyone therefore, realizing these basic values by which we live, then say that we are not conservationists? I maintain to you that we *are* and probably in its purest form, and have been so since before it became a national priority.

Did we overhunt the buffalo, pollute the rivers, fill the land with all manner of dangerous substances, or poison the heavens? And now you would ask that we, the indigenous population of this great country, forsake our fundamental religious practices in order to attempt to reverse a situation which we had no part in creating?

It has also been said that Native Americans consider themselves a special class of citizen that can go around poaching endangered and threatened animals because they can then cloak themselves with the umbrella of religious freedom. I sincerely believe that whoever makes statements such as this is not doing so out of malice, mean-spiritedness or bigotry, nor with the intention of classifying Indians as liars. Rather, I am convinced that this is said out of ignorance of our religious and cultural needs. Because of this I would like to give you some factual information in this regard. But first I must state that the Hopi religion, as well as many other Indian religions, is held very secretively. I will, however, attempt to tell you as much as I am able without overstepping these bounds.

It is being suggested that, in order to not infringe upon our religious practices, an exception be made for religious purposes under a permitting process to be issued by the Secretary of the Interior. Although we appreciate this attempt to respect our religious freedom, how free would you consider us or any other temporal group to be, if it needed to apply for and receive permission from the Federal Government, prior to conducting important religious ceremonies? To my mind this would constitute a massive contradiction.

I would not attempt to convince this distinguished body that we Indians do not have our wrong doers. There are those individuals who would hunt endangered and threatened animals for personal gain. But I unequivocally assure you that we not only object to these practices, but in fact abhor them. We of the tribal government would certainly be prepared to work hand in hand with you or the Department of the Interior toward the implementation of a method of policing against these activities within the boundaries of our eminent domain. We would be closer to the problem and therefore more efficient at halting and penalizing those who would indulge in the wanton taking of endangered and threatened animals.

I am sure you appreciate the fact that you are considering action which would have an impact on the First Amendment rights of Indian people. Action which could irreparably damage the religion (which in many cases is the backbone of the culture) of a minority already beset with the weight of broken promises. Before you take an action with such deep reaching impacts, you should look at the matter very, very closely. Not only could I not hope to answer all the questions which you should ask, prior to considering as drastic a solution as the legislative method which is proposed to be put before you, but in the few hours to which you have limited this hearing, I could not even supply you with all the proper questions. After all, how much do you know about other Indian religions and their needs? Do you at least know how many tribes would be adversely affected by such action? Do you know how many types of animals and numbers thereof are involved? Every tribe practices its religion differently, and will not talk about it to outsiders. You cannot take what I have told you about Hopi and extend that by the number of recognized tribes. My Indian brothers and I are not suggesting that you ignore the problem of endangered and threatened species simply on the say-so of the Indians. What we suggest is that before you attempt to solve what you perceive may be a problem, that you first study the issue, gather and analyze the facts and establish the existence of a problem and magnitude thereof. Before you suggest that this process would take a longer time than you would choose to devote, remind yourselves of the fact that you would be tampering with some very basic, guaranteed constitutional rights, which would deserve nothing less than the most careful scrutiny. Otherwise you may find that you have killed a fly with a cannon, if a fly exists at all.

I would be happy to answer any questions you may have. I want to thank you again, Mr. Chairman and members of this Subcommittee for this opportunity which you have accorded me. I am sure I speak not only for the Hopi people, but also for all my Indian brothers when I say that we are ready to help you gather the facts surrounding this very sensitive, emotional, constitutional issue, in order to arrive at some mutually agreeable solution if one should become evidently necessary.

Mr. BREAUX. Who would like to go next?

Ms. HARJO. I would, Mr. Chairman.

**STATEMENT OF SUZAN SHOWN HARJO, EXECUTIVE DIRECTOR,
NATIONAL CONGRESS OF AMERICAN INDIANS**

Ms. HARJO. Thank you, Mr. Chairman.

My name is Suzan Shown Harjo, and I am Cheyenne and Creek, from El Reno, OK.

The Cheyennes are bears and, as such, we don't eat bear or hurt bear, and since there are a lot of bear on the endangered and threatened species list, I want you to know that you have no problem in that regard from us.

We have a lot of problems in practicing the various religions in this country that are indigenous to this land, so much so that it seems that Indians are an endangered species. Every Indian person I have talked to about this amendment has had a similar first reaction: It is about time that Congress put Indians as endangered species.

Then, I have gone on to explain what the amendment is about and they have taken quite another view, and every Indian person I have talked with has been opposed to this, and has been opposed to it not because it is a terrible idea, not because we are opposed to the conservation laws, but because no one has tried to work with the Indian people to do something that will result in an enhanced population of the animals and plants that we depend upon for our religious activities and that are central to our religions.

What is going to happen if you enact this law is not that the Indian people will stop practicing their religions or attaching ritual and spiritual significance to our sacred objects. What will happen is that the people who care most deeply about conservation of the protected environment are going to end up in jail, and those are the very people who can work with Congress, who can work with the Federal Government to best mitigate and enhance these populations.

We urge you to enter into some sort of cooperative process, such as has been suggested here and as has been outlined in my written testimony.

Indian tribes are engaged in numerous law enforcement efforts, in the drug area, for example, working with the United States to stop drug trafficking through Indian reservations by non-Indians. This is occurring today both along the United States-Mexico border and along the United States-Canada border.

This has happened since treaty-making time. That is why our treaties have clauses in them called the deliver up-the-bad-men clauses. They say, when your bad men do something, you will give them up to you; when our bad men do something, you will give them up to us. Both sides recognize that we all have bad men

among us and that something has to be done. We are perfectly willing to work with anyone to deliver up the bad men on both sides.

In the Fort McDowell area in Arizona, there is an important eagle nesting area, as some of you may know. Despite congressional attempts to build the Orme Dam there as the capstone to the central Arizona project, the Fort McDowell Indian people fought all congressional efforts to do that, and were successful in saving that eagle nesting area.

Now, after over a decade of their struggle for those eagles, the Fish and Wildlife Service and the Bureau of Indian Affairs have entered into an enhancement agreement regarding those eagles in the Fort McDowell area. We are very happy to see the Federal agencies come along, even though it has taken, in this instance, a decade. We are happy to see that there is no more pressure on the Fort McDowell Indians—or those baby eagles in that area—pressure that a dam will be built.

I hope you will reject the idea of approaching this in a punitive way without having tried something constructive. I hope you will listen to what we have said, and I hope that this is not simply a pro forma hearing to give us some semblance of due process prior to doing what was intended initially.

Thank you very much.

[Prepared statement of Ms. Harjo follows:]

PREPARED STATEMENT OF SUZAN SHOWN HARJO, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. Chairman and Members of the Subcommittee, thank you for holding this hearing and for accordng an opportunity for the National Congress of American Indians (NCAI) to provide testimony. The NCAI is the oldest and largest national membership organization serving American Indian and Alaska Native governments and people. Among our membership are myriad tribal and religious leaders and practitioners of traditional Indian and Native religions who desire and deserve to be heard on a matter of such great import as this.

We urge the Subcommittee to hear these specific concerns—each of which must be viewed within its separate context of history, geography, treaty and other laws, religious tenets and practices and other circumstances—and to sincerely weigh the consequences of the proposed amendment. We propose that this be done in a series of hearings throughout Indian country, to be held in conjunction with the House Interior and Insular Affairs Committee and the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, which have knowledge of and jurisdiction regarding Indian and Native treaty and religious freedom rights.

We also urge the Subcommittee to direct the Interior Department to gather data, such as that requested in our attached May 28 and June 10, 1985, letters to the Department, and to enter into a process with Indian and Native tribal and religious leaders to identify potential enhancement and mitigation opportunities, as well as the need for cooperative law enforcement and monitoring efforts. Indian and Native governments have jurisdiction over some 50 million acres of land today. Billions of acres of land were ceded to the United States in perpetuity in exchange for protection against encroachment against reserved rights, including religious rights and hunting, fishing and gathering rights on- and off-reservation. These religious freedom rights are protected by the First Amendment and by the highest moral standard and founding principle of the Constitution. Treaties are characterized in the Constitution as the "Supreme Law of the Land" and set forth rights that are compensable under the Fifth Amendment.

Before this Subcommittee can apply a legitimate balancing test, which is the very least that is required in relation to a proposed violation of treaty and constitutionally protected rights, it must be aware of the ramifications of the proposed action, it must have before it a dire situation that can be addressed in no other way and it must have exhausted all other possible solutions. These basic elements of fairness are missing here. The Subcommittee does not know the nature or extent of the rights that would be affected by the amendment. We are not faced with an emergen-

cy situation of diminishing populations of protected creatures, and certainly not a situation that has been brought to the attention of Indian and Native governmental and religious leaders.

The amendment has been proposed in an effort to overturn a recent court decision that, as a practical matter, changes nothing. The 8th Circuit decision in the *Dion* case, upholding the 1974 *White* decision, held that the Endangered Species Act, the Eagle Protection Act and the Migratory Bird Treaty Act do not supercede or abrogate Indian treaty rights and that the citizens of the Yankton Sioux Tribe possess treaty hunting rights on their Reservation for noncommercial purposes. (*U.S. v. Dion*, 752 F.2d 1261, 1985, and *U.S. v. White*, 508 F.2d 452, 1974.) The *Dion* decision resulted from a federal sting operation involving proven entrapment. In this case, federal actions themselves may have been responsible for a greater taking than would have occurred otherwise.

While the *Dion* decision deals with eagles only, the amendment would cover all endangered or threatened creatures and plants, now and in the future, including several that are the subject of international treaties and agreements. In relation to the bowhead whale and various fish species, Indian and Native people have been the first to recognize the need to protect these species, upon which they depend for religious, subsistence and cultural purposes. And, Indian and Native people have willingly entered into enhancement and mitigation efforts through their governments and through cooperative enforcement efforts.

The *Dion* decision does not open up new avenues for wanton killing of endangered or threatened species. The slaughter of these creatures and the destruction of these plants are repugnant to the vast majority of Indian and Native people. Indian and Native governments and people did not erect the power lines that electrocute eagles and cause their deaths to a greater extent than other causes in the United States. Indian and Native governments and people do not come before you to ask for an exemption for lead-shot, which kills great numbers of eagles and other protected creatures. Indian and Native governments and people do not expect to take the last remaining creature or plant, for we all are children of Mother Earth. We have a spiritual and ritual dependence upon these creatures and plants. If they do not survive, we do not survive as Indian and Native people. There are few Indian and Native people today. Our total population is less than 1.5 million people. And, our population of traditional Indian and Native people is much smaller than that number. Congress does not have the moral right to pursue the last traditional Indian and Native people to extinction.

We ask only that you set aside this Draconian amendment and work with Indian and Native tribal and religious leaders to adopt an approach that would result in enhanced numbers of endangered and threatened species. It is only common sense to work closely with Indian and Native governments, who can best sanction abusers and who can best control activities within their jurisdictions, which included 43,410,186 acres of rangeland and forests, 1,829,118 acres of dry farmland, 917,580 acres of irrigated farmland, 913,000 acres of water reservoirs and lakes, 45,352 reservoirs and impoundments, 3,199 natural lakes and ponds and 12,000 miles of perennial streams.

The NCAI stands ready to assist in this process in any way that would be beneficial.

NATIONAL CONGRESS OF AMERICAN INDIANS

Feb. 1980

May 28, 1985

EXECUTIVE DIRECTOR

Susan Shown Harris
Cheyenne & Crow

EXECUTIVE COMMITTEE

PRESIDENT

Joe De La Cruz
Ojibwa Nation

FIRST VICE PRESIDENT

Eddie Tuttle
Poncha Band of Chees

RECORDING SECRETARY

Diana Kelley
Cherokee of Oklahoma

TREASURER

Keith Jarett
Cheyenne River Sioux

AREA VICE PRESIDENTS

ABERDEEN AREA

Morgan Garrison
Cheyenne River Sioux

ALBUQUERQUE AREA

Bennie Sams
Zia Pueblo

ANADARKO AREA

Newton Lamer
Wichita Tribe

BILLINGS AREA

James Steele
Sahara Kootenai Tribes

JUNEAU AREA

John Hope
Tlingit & Haida

MINNEAPOLIS AREA

Apostrophe
Menominee

MUSKOGEE AREA

Harry F. Gilmore
Coushatta

NORTHEASTERN AREA

Rovana Abrams
Seneca Nation

PHOENIX AREA

Thomas R. White
Gila River

PORTLAND AREA

Deborah Frank
Warm Springs

SACRAMENTO AREA

Dana Turner
Rincon Band of Luseno

SOUTHEASTERN AREA

A. Bruce Jones
Lumbee

The Honorable Donald Paul Hodel

Secretary

U.S. Department of the Interior

18th & C Streets, N.W.

Washington, D.C. 20240

Dear Mr. Secretary:

On behalf of the National Congress of American Indians, I wish to express our appreciation for your timely assistance in persuading Rep. Breaux to delay introduction of his amendment to include Indian governments and people under the Endangered Species Act. As you know, Rep. Breaux has set June 11 as the hearing date on this issue.

We are not pleased that the hearing on this complex issue involving Indian treaty and religious freedom rights is being held on such short notice and that it is scheduled for a half-day only, with Indian witnesses being accorded only a small portion of the few scheduled hours.

There is information which we would like prior to the hearing, information that we feel the Department has and should be able to make available to us before June 11:

1. How many permits have been issued to Indian people to take and use bald and golden eagles for religious usage under the Eagle Protection Act?
2. How many permits have been issued to take bald and golden eagles for other than religious usage - for scientific, exhibition, protection of livestock and falconry uses - under the Eagle Protection Act?
3. How long is the waiting list, in terms of time and numbers of requests, at the Feather Repository in Pocatello, Idaho, for Indian requests for eagle feathers, eagle parts and eagle carcasses and any other species that are dispensed from the Repository?
4. What are the entities or groups of people, besides Indian people, that have legal access to eagle feathers, parts and carcasses.
5. Statistical data and maps or charts providing information by geographic area regarding the status of species on the endangered and threatened lists.

804 D STREET, N.E. • WASHINGTON, D.C. 20002 • (202) 546-9404

NATIONAL CONGRESS OF AMERICAN INDIANS

Feb. 1980

Letter - The Honorable Donald Paul Hodel
 Re: Request for Information on Endangered Species
 May 28, 1985
 Page Two

DIRECTOR

H. Harjo
 Chief

VICE COMMITTEE

T. C. Harjo
 Vice President

SECRETARY

H. Harjo
 Secretary

MEMBERS

H. Harjo
 Member

EXECUTIVE DIRECTOR

H. Harjo
 Executive Director

REGIONAL DIRECTORS

H. Harjo
 Regional Director

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

ADVISORY BOARD

H. Harjo
 Advisory Board

6. Any cooperative agreements, such as the recent BIA-FWS agreement concerning the eagle nesting area on the Fort McDowell Reservation, regarding mitigation and enhancement efforts for endangered or threatened species with geographic proximity to Indian governmental jurisdictions.

7. What communications has the Department had with tribal and Indian religious leaders regarding endangered or threatened species in their areas? And, what have been the responses of Indian people when they have been specifically notified about a problem in their areas?

8. Any cooperative agreements with Indian governments regarding mitigation and enhancement efforts for endangered or threatened species.

9. What is the status of the proposed Executive Order that was said to have been under review in 1979 when the Secretary of the Interior delivered to Congress the Report mandated by the American Indian Religious Freedom Act of 1978?

Mr. Secretary, you may be aware that I was the coordinator for the above-referenced Report, when I served as a special assistant in the Department. Since 1979 in both the previous Administration and the present one, I am aware that little attention has been paid to the Indian religious freedom issues in the Department. In fact, so little attention has been focused on these issues that, until this year, I received letters to the Department at my places of employment in private law firms, as if these issues were personal interests of mine, rather than federal obligations beginning with responding to controlled correspondence. If there is benefit to Rep. Breaux' proposed amendment, it is that some attention must now be paid to these issues.

I would be most appreciative of the Department's sincere efforts to provide the information we have requested.

Sincerely,

Suzan Shown Harjo
 Executive Director

NATIONAL CONGRESS OF AMERICAN INDIANS

Vol. 1985

June 10, 1985

EXECUTIVE DIRECTOR

Suzan Shown Harjo
Cheyenne & Creek

EXECUTIVE COMMITTEE

PRESIDENT
Joe De La Cruz
Quinnipiac Nation

FIRST VICE PRESIDENT
Eddie Tullia
Poncha Band of Creeks

RECORDING SECRETARY
Diane Keller
Charlotte of Oklahoma

TREASURER
Keith Jewett
Cheyenne River Sioux

AREA VICE PRESIDENTS

ABERDEEN AREA
Morgan Garreau
Cheyenne River Sioux

ALBUQUERQUE AREA
Bennie Sales
Zia Pueblo

ANADARKO AREA
Newton Lamar
Wichita Tribe

BILLINGS AREA
James Steele
Sisseton Kootenai Tribes

JUNEAU AREA
John Hope
Tlingit & Haida

MINNEAPOLIS AREA
Agesanahwaet
Menominee

MUSKOGEE AREA
Harry F. Gilmore
Ojibwa

NORTHEASTERN AREA
Rovena Abrams
Seneca Nation

PHOENIX AREA
Thomas R. White
Gila River

PORTLAND AREA
Delbert Frank
Warm Springs

SACRAMENTO AREA
Dennis Turner
Rincon Band of Luseno

SOUTHEASTERN AREA
A. Bruce Jones
Lumbee

Clark R. Bavin, Chief
Fish and Wildlife Law Enforcement Division
1375 K Street, N.W., Suite 300
Washington, D.C. 20005

Dear Mr. Bavin:

We received a call from Kathleen King of your office on Friday, June 7th, in response to our May 28, 1985 letter to Secretary Donald Hodel regarding information needed for a Congressional hearing on the Endangered Species Act.

Ms. King had just received the letter on June 7th from the Interior Solicitor's office and answered the questions in a telephone conversation with NCAI staff to the best of her ability given inadequate time for research.

Below are our questions from our May 28th letter and Ms. King's oral responses. We would appreciate verification of those responses. In addition, further work needs to be done to fully respond to the questions. Much of that work will involve communication with your regional offices. Even though we will not have complete answers by the June 11 hearing, we still need the information in anticipation of House and Senate floor action on the Endangered Species Act.

1. How many permits have been issued to Indian people to take and use bald and golden eagles for religious usage under the Eagle Protection Act?

Answer: The total is unknown as permits are issued in the regions. A very rough idea is 600-800 over the past five years. This number represents permits issued, some of which are for more than one eagle. Also, one person may have had several permits.

Normally, when a permit is applied for the person is given a whole eagle carcass because the carcass is frozen -- this is true whether the person applied for part of an eagle or the whole eagle, a practice which may be changed.

804 D STREET, N.E. • WASHINGTON, D.C. 20002 • (202) 546-9404

Ms. King did not have a breakdown of permits by bald and golden eagles. She also stated that no permits are issued to take bald eagles, but they can be for golden eagles.

2. How many permits have been issued to take bald and golden eagles for other than religious usage -- for scientific, exhibition, protection of livestock and falconry uses -- under the Eagle Protection Act?

Answer: No permits are issued to take bald eagles. Permits may be given, however, to possess bald eagles. Ms. King did not have information which indicates the number of permits for possessing vs. taking golden eagles.

3. How long is the waiting list, in terms of time and number of requests, at the Feather Repository in Pocatello, Idaho, for Indian requests for eagle feathers, eagle parts and eagle carcasses and any other species that are dispensed from the Repository?

Answer: The waiting time is 1 1/2 to 2 years, and there are currently 800 shipping orders backlogged. There are 150 bald eagles available. Ms. King did not have a breakdown of the 800 backlogged orders, i.e., requests for bald eagles vs. other migratory bird requests. We would also like to know if any of the 800 outstanding orders are from non-Indians.

4. What are the entities or groups of people, besides Indian people, that have legal access to eagle feathers, parts and carcasses?

Answer: If an eagle has been killed, the Fish and Wildlife personnel have access to the bird for purposes of research and autopsy. The carcass is then sent to Pocatello. Fish and Wildlife law enforcement personnel also have access to dead eagles for purposes of their jobs, but after the need has been met the carcass is to be sent to Pocatello.

If an eagle is injured it may be given to a zoo. Occasionally, permits are given to ranchers to kill eagles if they are killing livestock. The carcasses, however, are to be sent to Pocatello. Ms. King did not have numbers with regard to the numbers of permits given to kill eagles for depredation purposes. We need to confirm whether the permits under these circumstances are for golden and/or bald eagles. (This may have been answered in question #2).

5. Do you have statistical data and maps or charts providing information by geographic area regarding the status of species on the endangered and threatened lists?

Answer: The law enforcement Division did not have this information, but referred us to the Endangered Species Office at 235-2771. This office said they do not have maps, but offered us a book which lists endangered and threatened species by state and suggested a place to call to get a map regarding bald eagles.

6. Are there any cooperative agreements, such as the recent BIA-FWS agreement concerning the eagle nesting area on the Fort McDowell Reservation, regarding mitigation and enhancement efforts for endangered or threatened species with geographic proximity to Indian governmental jurisdictions?

Answer: Ms. King did not have a detailed answer to this question, as the agreements would be negotiated in the field. She also indicated that many negotiations are the result of a federal project involving the Corps of Engineers or the Bureau of Land Management, and in those cases, the agreement would be between those agencies and the tribes.

7. What communications has the Department had with tribal and Indian religious leaders regarding endangered or threatened species in their areas? And, what have been the responses of Indian people when they have been specifically notified about a problem in their area?

Answer: As these communications would take place in the field, there was no specific information available. Ms. King did indicate that communications between the Fish and Wildlife Service personnel and tribal people are frequent.

8. What information do you have with regard to any cooperative agreements with Indian governments regarding mitigation and enhancement efforts for endangered or threatened species.

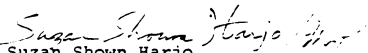
Answer: This question duplicates question #6.

9. What is the status of the proposed Executive Order that was said to have been under review in 1979 when the Secretary of Interior delivered to Congress the Report mandated by the American Indian Religious Freedom Act of 1978?

Answer: Ms. King was not familiar with the proposed Executive Order. Enclosed is a copy of the proposed Executive Order as reprinted in a 1982 hearing on Indian Religious Freedom Issues by the House Judiciary Subcommittee on Civil and Constitutional Rights.

Thank you for your assistance on these matters.

Sincerely,


Suzan Shown Harjo
Executive Director

NATIONAL CONGRESS OF AMERICAN INDIANS

Feb 1985

May 1, 1985

EXECUTIVE DIRECTOR

Susan Shown Harjo
Cheyenne & Crow

EXECUTIVE COMMITTEE

PRESIDENT

Joe De La Cruz
Ojibwa Nation

FIRST VICE PRESIDENT

Edna Tully
Pawnee Band of Creeks

RECORDING SECRETARY

Diane Kelsey
Cheyenne of Oklahoma

TREASURER

Kath Jovett
Cheyenne River Sioux

AREA VICE PRESIDENTS

ABERDEEN AREA
Morgan GarreauCHEYENNE RIVER SIOUX
Cheyenne River Sioux

ALBUQUERQUE AREA

Bernie Sales
De Pueblo

ANADARKO AREA

Newton Lister
 Wichita Tribe

BILLINGS AREA

James Steele
Sisseton Kiowa Tribe

JUNEAU AREA

John Hope
Tlingit & Haida

MINNEAPOLIS AREA

Apanahshewit
Mandan

MUSKOGEE AREA

Harry P. Giddens
Ojibwa

NORTHEASTERN AREA

Rayona Abrams
Seneca Nation

PHOENIX AREA

Thomas R. White
Gila River

PORTLAND AREA

Delbert Frank
Warm Springs

SACRAMENTO AREA

Dane Turner
Rincon Band of Luiseño

SOUTHEASTERN AREA

A. Bruce Jones
LumbeeThe Honorable John B. Breaux
ChairmanSubcommittee on Fisheries & Wildlife
Conservation and the Environment
Committee on Merchant Marine & Fisheries
U.S. House of Representatives
2113 Rayburn House Office Building
Washington, D.C. 20515RE: Objection to Potential Amendments to
Interfere with the Free Exercise of
Native American Traditional Religions

Dear Mr. Chairman:

The purpose of this letter is to strongly object to amendments to the Endangered Species Act, which we are advised will be proposed in the mark-up session on May 2, 1985. We respectfully urge you to set aside the amendments on behalf of the membership of the National Congress of American Indians, which is the oldest and largest national organization serving American Indian and Alaska Native governments and people.

The potential amendments, which would include Indians and Indian tribes within the definition of "Person" and which would impose regulatory restrictions on the practice of Native American religions, are inconsistent with existing law and policy and would cause increased hardship for an already overburdened segment of American society.

In 1978, Congress passed the American Indian Religious Freedom Act, clarifying national policy and attempting to bring Indian and Native people under the full protection of the U.S. Constitution in regard to religious practices. The Act mandated the President to report to Congress the results of an "evaluation, undertaken in consultation with Native traditional religious leaders, concerning administrative and legislative changes considered necessary for the protection and preservation of the religious cultural rights and practices of the American Indian, Eskimo, Aleut and Native Hawaiians."

NATIONAL CONGRESS OF AMERICAN INDIANS

Feb. 1988

EXECUTIVE DIRECTOR

Susan Shown Harte
Cheyenne & Crow

EXECUTIVE COMMITTEE

PRESIDENT

Joe De La Cruz
Quinnipiac Nation

FIRST VICE PRESIDENT

Eddie Tullis
Pawnee Band of Crooks

RECORDING SECRETARY

Diane Kelley
Cherokee of Oklahoma

TREASURER

Kath Jacob
Cheyenne River Sioux

AREA VICE PRESIDENTS

ABERDEEN AREA

Morgan Garretts
Cheyenne River Sioux

ALBUQUERQUE AREA

Bernie Bates
Zia Pueblo

ANADARKO AREA

Heaven Limer
Wampanoag Tribe

BILLINGS AREA

James Steele
Salish Kootenai Tribes

JUNEAU AREA

John Hoot
Tlingit & Haida

MINNEAPOLIS AREA

Apoanahmish
Menominee

MUSKOGEE AREA

Harry F. Givens
Ojibwa

NORTHEASTERN AREA

Royce Abrams
Seneca Nation

PHOENIX AREA

Thomas R. White
Gila River

PORTLAND AREA

Debert Frank
Warm Springs

SACRAMENTO AREA

Diane Turner
Rincon Band of Luiseño

SOUTHEASTERN AREA

A. Bruce Jones
Lumbee

Letter - The Honorable John B. Breaux

Re: Amendments Restricting Indian Religious Practices
May 1, 1985

Page Two

In 1979, the mandated Report was transmitted to the Congress. Since that time, Congress has failed to act on any of the recommendations. And since that time, only one hearing has been held on the subject, in 1982, by the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary.

Also in 1979, the United States reported to the world community of nations on its compliance with the Helsinki Accords that Indian and Native governments and people were covered under the Principles concerning self-determination and human rights, stating in respect to religious freedom that: "The religious practices of American Indians are an integral part of their culture, tradition and heritage and form the basis of Indian identity and value systems. To guarantee Indian rights in this regard, the American Indian Religious Freedom Act was signed into law in August of 1978. The Act proclaims that it is the policy of the U.S. to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise their traditional religions, including, but not limited to, access to sites, use and possession of sacred objects and the freedom to worship through ceremonies and traditional rites." (Report of the Commission on Security and Cooperation in Europe, "Fulfilling Our Promises: The United States and the Helsinki Final Act," November, 1979.)

Specifically, we object to the potential amendments for the following reasons:

1. Tribes are inherently sovereign governments, in treaty and other formal relationships with the United States, and recognized as such in federal law and policy.
2. The United States Constitution protects all religions against federal regulations, including American Indian and Alaska Native religions.
3. It is the stated policy of the United States in the American Indian Religious Freedom Act of 1978 to remove, not impose, barriers that stand in the way of the free exercise of traditional Native American religions.

NATIONAL CONGRESS OF AMERICAN INDIANS

Feb 1988

EXECUTIVE DIRECTOR

Susan Shown Harjo
Cheyenne & Creek

EXECUTIVE COMMITTEE

PRESIDENT

Joe De La Cruz
Quinnell Nation

FIRST VICE PRESIDENT

Edith Tuttle
Pawnee Band of Creeks

RECORDING SECRETARY

Diana Kelley
Cherokee of Oklahoma

TREASURER

Keith Jensen
Cheyenne River Sioux

AREA VICE PRESIDENTS

ASBERDEEN AREA

Morgan Garreau
Cheyenne River Sioux

ALBUQUERQUE AREA

Bernie Sasse
Zia Pueblo

AMADORGO AREA

Newton Lamer
Wichita Tribe

BILLINGS AREA

James Skene
Salish Kootenai Tribes

JUNEAU AREA

John Hope
Tlingit & Haida

MINNEAPOLIS AREA

Adrianne Smith
Marquette

MUSKOGEE AREA

Harry F. Gilmore
Ojibwa

NORTHEASTERN AREA

Rovena Abrams
Seneca Nation

PHOENIX AREA

Thomas R. White
Gila River

PORTLAND AREA

Deborah Franz
Warm Springs

SACRAMENTO AREA

Doris Turner
Rincon Band of Luiseño

SOUTHEASTERN AREA

A. Bruce Jones
Lumbee

Letter - The Honorable John B. Breaux

Re: Amendments Restricting Indian Religious Practices

May 1, 1985

Page Three

4. The amendments would subject Indian and Native people to restrictions against the free exercise of traditional Native American religions, causing perhaps irreparable damage and undue hardship and resulting in myriad constitutionally-based lawsuits.

5. The Administration-inspired amendments constitute a backdoor effort to inappropriately interfere with ongoing litigation, without any consultation with its own officials who are charged with administering Indian affairs.

6. Indian and Native religions are not run by tribal governments, for the most part, but exist through and across tribal boundaries.

7. There has been no consultation with Indian or Native tribal or traditional religious leaders regarding this issue of such vital interest to so many of them.

8. The Subcommittee has not consulted with the Members of the House who are most directly involved with, concerned about and knowledgeable of Indian and Native religious freedom issues.

9. The Subcommittee has not looked at this legislation in light of settled law and policy respecting the ceremonial use of fisheries by tribes and individual Indians in the Pacific Northwest, the Great Lakes, Alaska and elsewhere, and has not held a open hearing process to consider the impact of the potential amendments.

In telephone conversation today with Subcommittee staff, I have been told that Indians cannot expect to take the last of the endangered species and that there has been an open process, in that the Department of the Interior even testified on this subject. In the first instance, Indian people have a vested interest in protecting the endangered species, because many are so integral to our religions. Recall that the non-Indians, not we, destroyed the buffalo and nearly destroyed the salmon and eagle populations. In the second instance, the Department of the Interior's involvement in a matter before Congress on an Indian issue is insufficient to fully assess the impact of an action on Indian policy and Indian lives. The

NATIONAL CONGRESS OF AMERICAN INDIANS

Feb. 1980

Letter - The Honorable John B. Breaux

Re: Amendments Restricting Indian Religious Practices

May 1, 1985

Page Four

EXECUTIVE DIRECTOR

Suzan Shown Harjo
Cheyenne & Creek

EXECUTIVE COMMITTEE

PRESIDENT

Joe De La Cruz
Quinnipiac Nation

FIRST VICE PRESIDENT

Edith Tullie
Pocahontas Band of Creeks

RECORDING SECRETARY

Diane Kelley
Cherokee of Oklahoma

TREASURER

Kath Jernett
Cheyenne River Sioux

AREA VICE PRESIDENTS

ABERDEEN AREA

Morgan Garreau
Cheyenne River Sioux

ALBUQUERQUE AREA

Bennie Sains
Zia Pueblo

ANADARKO AREA

Newton Lamer
Wichita Tribe

BILLINGS AREA

James Steele
Sagean Kootenai Tribes

JUNEAU AREA

John Hope
Tlingit & Haida

MINNEAPOLIS AREA

Agesanahmet
Menominee

MUSKOGEE AREA

Harry F. Gilmore
Quasaw

NORTHEASTERN AREA

Rovana Abrams
Seneca Nation

PHOENIX AREA

Thomas R. White
Gila River

PORTLAND AREA

Osbert Frank
Warm Springs

SACRAMENTO AREA

Doris Turner
Rincon Band of Luiseño

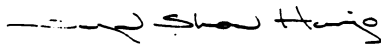
SOUTHEASTERN AREA

A. Bruce Jones
Lumbee

United States Constitution tells us that treaties are the Supreme Law of the Land and that Congress deals "with foreign Nations, and among the several States, and with the Indian Tribes." It does not tell us that our ancestors' treaty understandings are beside the point or that the Interior Department lawyers for fish and wildlife can represent our interests before Congressional bodies. The Subcommittee staff person also stated that, in connection with ongoing litigation, the Congress can do anything it wants. Some in Congress may feel that they can do anything they want in regard to Indian and Native people and governments, as well. This may be another nation's system of government, but I had not thought that it was the American system of administering justice.

We urge you to address this issue in the full light of day, through consultation and hearing processes with tribal and traditional religious leaders, in an open effort to arrive at a solution. If we might help in this effort, please contact us at the number and address below.

Sincerely,



Suzan Shown Harjo
Executive Director

cc: Members, House Committee on Merchant Marine & Fisheries
Members, House Committee on Interior & Insular Affairs
Members, House Committee on the Judiciary
Members, House Committee on Interior Appropriations
Members, Commission on Security & Cooperation in Europe

AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, P.L. 95-341, Federal Agencies Task Force, Chairman, Cecil D. Andrus, Secretary of the Interior, August 1979, pp. 68-72.

III. RECOMMENDATIONS

C. Sacred Objects

1. Background - Statement of Issues

Native traditional religions are based on the natural environment. Their practitioners rely on natural substances for their religious observances. Certain wildlife, plants and minerals - which may be worn, carried or simply present - are considered sacred and fundamental to the religious and ceremonial life.

The sacred objects of a ceremony or religion may be, for example, the salmon, eagle, buffalo, kit fox, hawk, shark, snake, deer, moose, elk, squirrel, turtle, bowhead or butterfly. Some religions or ceremonies may hold venerable claws, feathers, beaks, tusks, hides, fangs or quills; while particular plants - such as sage, tobacco, mescal, yucca, sweet grass, cedar, peyote - are central to others. Drums, arrows, masks, prayer feathers, pipes, totems, medicine bundles and other objects made from natural materials are held sacred in certain Native religions. Natural products may be roots or rocks, berries, gourds, leaves, shells or turquoise - they may be consumed, buried, held, carried or observed, and are commonly used for healing, purification or visions, according to religious customary law.

2. Identification of Problems - Response

In recent times, many animals, plants and mineral materials have not been available for use in Native American religions. Non-Native settlement of the country and the introduction of non-indigenous species inevitably led to a great reduction of the natural animal and plant species. Most notable was the almost complete annihilation of the buffalo, once extensively used in the religions of the Plains Indians.

This scarcity of natural substances used in Native American religions was exacerbated by large federal construction projects which greatly affected wildlife habitats and rendered inaccessible many deposits of mineral substances.

Prior to this century, many American Indian tribes and Native Hawaiian groups were removed by federal action to areas away from their traditional homelands, often far from fishing, gathering and hunting grounds. Time and distance have not diminished the need of many Native religious practitioners and leaders to return periodically to these places. While some tribal religions and geographical situations allow for the substitution of comparable materials, most do not. Despite great difficulty involved in these journeys, many religious leaders and practitioners travel to their traditional places to gather materials necessary for religious purposes. Once the journey is made, some are unable to gather the needed materials because of regulatory provisions or administrative procedures. For those Native people who are precluded from travel or from gathering, the continued practice of their deeply held religious beliefs becomes almost an impossibility.

In an effort to preserve the natural species of the country, conservation laws were passed. Because Native religious use of these species was taken into account only in the Bald Eagle Protection Act, these laws have not remedied problems in obtaining these species for Native religious use. Objections have been raised regarding existing administrative procedures under the Bald Eagle Protection Act. These procedures are being revised now by the Fish and Wildlife Service, in consultation with Native religious and tribal leaders.

The Fish and Wildlife Service (FWS) is also responding to a Native religious need in a related area. During the Task Force consultation in Oklahoma, traditional Muscogee leaders spoke of the need to take squirrel for ceremonial feasts throughout the year. Leaders of the Kickapoo also spoke of their need for 32 deer each year for religious purposes. The religious ceremonial need arises year-round, and only coincidentally with the Oklahoma hunting season. Similar situations were addressed by other tribal leaders in consultations throughout the country. As a matter of policy rather than statutory obligation, the FWS honors the applicable state fish and game regulations on federal lands under its control. The FWS recognizes that state regulations developed prior to enactment of P.L. 95-341 may not have taken these unique needs into account at time of promulgation, and that they do not meet these expressed needs at present. The FWS is now addressing these concerns.

Many Native Americans are unaware of present statutory and regulatory provisions allowing for the gathering of animals, plants and mineral substances on federal lands. For instance, fee waivers and use permits for most of such taking are allowed under existing statutory authorities, as outlined in the previous section dealing with federal lands. To lessen the problem of lack of information in the Native and tribal communities and reservations, the Interior Assistant Secretary for Indian Affairs will undertake a vigorous effort to disseminate relevant information nationwide. This effort will be coordinated with the appropriate federal agencies.

Native American religious use of peyote, allowed under the statutory authority of the Administrator of the Drug Enforcement Administration, is needlessly complicated through the use of the distribution system under Texas regulations. Although American Indians only are permitted to use peyote for religious purposes, only non-Indians are the authorized distributors. Further complications arise in the use of forms ill-suited to the needs of many of those who use peyote in religious ceremonies.

Increasing difficulties in obtaining peyote for religious use may be relieved administratively by allowing traditional Indian religious harvesting of peyote on federal lands in the Southwest and allowing the importation of peyote from Mexico for Native religious use. The Drug Enforcement Administration will continue to consult with practitioners of traditional peyote religions and the Native American Church on this issue.

Appendix C contains a tabular presentation of examples of problems identified by practitioners of Native religions in obtaining, possessing and using the animal, plant and mineral material necessary for religious use. Statutory authorities and applicable Task Force recommendations for uniform administrative procedure are then stated.

3. Statutory Authorities for Administrative Actions

Statutes authorizing or permitting the use of plants, animals and mineral materials by practitioners of Native American religions:

16 USC 668a (Native American religious use of eagles permitted.)

16 USC 1371(b) (Marine Mammal Protection Act, provision for Alaska Native subsistence use which may be applied to religious use.)

16 USC 1539(e)(1) (Endangered Species Act, provision for Alaska Native subsistence use which may be applied to religious use.)

16 USC 704 (Migratory Bird Treaty Act, provision allowing Secretarial determination for taking, killing and possession.)

21 USC 952, 953 (Allows importation and exportation of peyote, a controlled substance, at discretion of Attorney General for lawful purposes.)

30 USC 601 (Authorizes Secretaries of Interior and Agriculture to dispose of mineral materials on public lands.)

16 USC 668dd(d) (National Wildlife Refuge System, Secretarial interpretation that traditional Native religious uses, such as gathering of herbs and plants, are compatible with the major purposes of most refuges.)

4. Task Force Recommendations for Uniform Administrative Procedures

To further enable Native Americans to gather and use sacred objects, it is the recommendation of the Task Force that the Secretaries of Interior, Agriculture, Commerce and Treasury should establish a joint uniform set of administrative procedures to govern the disposition of surplus wildlife and plants or parts thereof which have been confiscated or gathered under the jurisdiction and control of the respective Secretaries. To the fullest extent allowed under existing statutory authority, the uniform procedures should be designed to increase the availability of natural products to Native American practitioners of Native traditional religions.

5. Recommendations for Congressional Consideration

The fifth, sixth, seventh and ninth whereas clauses of the Joint Resolution on American Indian Religious Freedom address the conservation laws as they relate to the Native American religious use and possession of sacred objects protected by statute:

* * *

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies ...

Resolved ... henceforth shall it be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to ... use and possession of sacred objects.

* * *

This policy indicates that administrative accommodations regarding Native religious use of the protected environment are now permissible under 42 USC 1996 and the discretionary authority of the Secretary of the Interior. The guiding principle for the nature and extent of any accommodation would be the preservation of the threatened species. Therefore, no specific recommendation is made at this time regarding any conservation law the Congress may consider in the future.

INDIAN RELIGIOUS FREEDOM ISSUES

HEARING
BEFORE THE
SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-SEVENTH CONGRESS
SECOND SESSION
ON
INDIAN RELIGIOUS FREEDOM ISSUES

JUNE 10, 1982

Serial No. 58



Printed for the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1982

spect for the dead, and that those religious beliefs are in fact violated when the graves are disturbed, and the religious items are removed from the grave and displayed in museums and parts of bodies are circulated around the country as objects of curiosity.

Does that answer your question?

Ms. GONZALES. Yes. I take it then this is not an isolated instance, that this is a fairly common problem that Indians are facing?

Mr. ECHO-HAWK. That is correct. I would say that all of the land-managing agencies that have anything at all to do with the antiquities acts are very top-heavy with archeologists, who as administrators have a built-in professional conflict of interest in resolving issues that would call for balancing the Indian religious interest against the professional interest of the archeologists.

Ms. GONZALES. Thank you.

Ms. HARJO. And relating to Congressman Edwards' question before and to Mr. Echo-Hawk's statement, I would like to say that TVA was one of the more resistant agencies to this process, and did not wish to make concessions in the task force report that might be seen as concessions in subsequent litigation that they were certain they would be involved in as a result of the building of Tellico Dam and other dams throughout the country. While I have great admiration and respect for the individual on the task force, the institutional approach of TVA was one of turf protection rather than co-operation and trying to see another way to do things.

I applauded the Navy earlier and I will here again. They were involved fully in litigation on this issue in regard to the Koholawe sacred site to the Native Hawaiians, and their reaction was quite different. In fact they reached an out-of-court settlement of that litigation, rather than taking the approach that TVA took.

Ms. GONZALES. One more question. In your statement, Ms. Harjo, you referred to an Executive order which was drafted during this review process to address some of the problems that were identified in the report. Can you explain what that Executive order would have done, and how important such an order is in alleviating some of these concerns?

Ms. HARJO. The Executive order—and I am not sure what its current incarnation is—as the task force had proposed it—and I would be happy to provide this draft to the subcommittee—would basically restate the policy of the act. Section 1, for example, would state that each Federal agency in managing Federal lands and resources shall accommodate native American religious practices to the fullest extent possible under existing Federal statutes.

Mr. EDWARDS. I would like you to make it a part of the record. [A copy of the draft of the proposed Executive order follows:]

EXECUTIVE ORDER ———, ———, 1979

PROTECTION OF RELIGIOUS FREEDOM OF NATIVE AMERICANS

By virtue of the authority vested in me by the Constitution and statutes of the United States of America and as President of the United States of America, in furtherance of Senate Joint Resolution 102 on Protection and Preservation of Traditional Religions of Native Americans (42 U.S.C. 1966), in order to assure that federal agency policies, practices, and procedures, as they affect the exercise of traditional Native American religious beliefs and practices, are consistent with the constitutional protection of the free exercise of religion, it is hereby ordered as follows:

SECTION 1. Each federal agency in managing federal lands and resources shall accommodate Native American religious practices to the fullest extent possible under existing federal statutes. This accommodation shall be reflected in each agency's managing, enforcement and permitting regulations, policies, and procedures with regard to access to federal land areas, gathering and use of natural substances endowed with sacred significance by Native American religious groups, provisions for group and individual activities on federal lands, and any other appropriate subject matter.

SECTION 2. Each federal agency shall revise existing regulations, policies, and practices to provide for specific consideration of any Native American religious concerns prior to making any decision regarding use of federal lands and resources.

SECTION 3. Each federal agency shall consider appointment of Native traditional religious leaders to existing boards, commissions, and other citizen advisory groups affecting federal land and resource planning, management, and practices. Each federal agency also shall determine whether it would be appropriate to create new boards, commissions and other citizen advisory groups designed specifically to assure adequate consideration of Native religious concerns in federal land and resource planning, management, and practices.

SECTION 4. To the fullest extent allowed under existing statutory authority, each federal agency shall reserve and protect federal areas of special religious significance to Native Americans in a manner similar to its reservation and protection of areas of special scientific significance.

SECTION 5. To the fullest extent allowed under existing statutory authority, each federal agency shall provide exemptions from restrictions on access to and gathering, use, and possession of federal property for Native religious purposes similar to those provided for scientific purposes.

SECTION 6. The Secretaries of Interior, Agriculture, Commerce and Treasury, and the Administrator of the General Services Administration shall establish a joint uniform set of administrative procedures to govern the disposition of surplus wildlife and plants or parts thereof which have been confiscated or gathered under the jurisdiction and control of the respective agencies. To the fullest extent allowed under existing statutory authority, the uniform procedures shall be designed to increase the availability of natural products to Native American practitioners of Native traditional religions.

SECTION 7. Whenever any federal agency cedes jurisdiction for any purpose to a state, it shall reserve federal jurisdiction over land and resource use for traditional Native religious purposes.

SECTION 8. When crossing the borders of the United States, Native Americans carrying articles for use in the Native traditional religion shall be treated with respect and dignity and, to the extent permitted under existing statutory authority, according to their own religious laws.

SECTION 9. The United States Customs Service shall, insofar as possible, assist Native Americans with problems encountered with counterpart agencies of other countries in regard to Native religious practices.

SECTION 10. Federal museums shall decline to acquire for their collections objects known to be of current religious significance to American Indian, Aleut, Eskimo or Native Hawaiian traditional religions, and shall inform such Native American tribal and religious leaders of the presence on the market or in non-Native hands of such objects as come to their attention.

SECTION 11. Federal museums shall return to the tribe of origin objects in the museum's possession as to which unconsenting third parties assert no ownership interest that were used or valued for religious purposes at the time of their loss from an American Indian tribe or Native American community, and were alienated from that community contrary to standards for disposition of such objects then prevailing in that community, provided that the successor or modern tribe or community requests them as needed for current religious practices.

SECTION 12. Federal museums shall consult traditional Indian religious leaders for guidance as to the museum's practices regarding exhibition and labeling, conservation, and storage of Indian, Eskimo, Aleut and Hawaiian sacred objects in their possession.

SECTION 13. Federal museums shall facilitate periodic ritual treatment by appropriate religious practitioners of sacred objects in their possession, at the request of such practitioners.

JIMMY CARTER

THE WHITE HOUSE
Date: _____

TESTIMONY OF SUZAN HARJO, LEGISLATIVE LIAISON, NATIVE AMERICAN RIGHTS FUND, AND WALTER ECHO-HAWK, PAWNEE INDIAN TRIBE, PAWNEE, OKLA.

Ms. HARJO. Thank you, Mr. Edwards, for that excellent statement and for your leadership in support of all social and justice issues in the U.S. Congress and for your support and leadership in our area. The statement I have submitted for the record I would request be included.

Mr. EDWARDS. Without objection, all of the statements will be made a part of the record.

Ms. HARJO. Thank you.

In addition to the statement that I have prepared for the today's hearing, I would like to make a few additional remarks to provide a context within which to view the problem and the situation where we are today. The Indian nations entered into treaties of peace and friendship with the United States, ceding a vast territory to the general government over which to govern, and reserved certain lands in exchange for peaceful coexistence, certain education, health, housing, and other services; protection against encroachment; and noninterference in very basic rights such as the carrying out of traditional and customary religious beliefs and instructions. And, from time to time, the Congress has chosen to investigate the status of Indian people in certain areas of Indian life and to enact laws to remedy the result of certain practices and actions—or inactions in the face of non-Federal actions—and Federal failure to protect the Indian peoples.

In the 1930's, Congress examined Federal interference in the internal matters of Indian governments and bureaucratic paternalism with regard to Indian governmental authorities, an investigation repeated in the mid-1960's and early 1970's. These investigations resulted in the Indian Reorganization Act of 1934, the Indian Self-Determination and Assistance Act of 1975, the repudiation of the failed termination policies of the 1950's, as well as the Indian Civil Rights Act of 1968, which recognizes traditional and customary Indian law.

In the late 1960's Congress examined the status of Indian education, which resulted in a Senate report entitled "Indian Education: A National Tragedy," and in turn resulted in the Indian Education Act of 1972, the Indian Self-Determination and Education Act of 1975, the Tribal-Controlled Community Colleges Act of 1978, and

the Bureau of Indian Affairs education programs and structural reforms of that same year.

Because of the investigation into the well-being of Indian children, Congress enacted the 1977 Indian Child Welfare Act. The Indian Health-Care Improvement Act of 1976 was passed after 4 years of historical review and recognition that certain Federal actions had lasting effects on Indian people: the cavalry delivered smallpox-infested blankets to Indians; the Army Corps of Engineers built dams that ended the centuries-long diet, nutritional, and health status of many fisheries-dependent tribes; the decimation of the buffalo, elk, and bear populations directly contributed to the decrease in the Indian populations dependent upon them. Boarding schools and some of the more racially biased practices in teaching the Indian children the arts of civilization were also a direct cause of the poor health and education of Indian people today. All of these investigations brought Congress to declare as policy that, in the Indian health area in 1976 and continuing to today, all funds necessary would be devoted to this problem until such time as the Indian standard of health care met that of the general American population.

Such remedial legislation was the American Indian Religious Freedom Act. As it is with the other acts, were there not a problem, there would be no need for a remedy. We are here before you as part of a people who are the least healthy, the poorest, the least educated, and the most restricted population in America. The problems in the Indian exercise of religious freedom are many and varied, involving direct, indirect, cumulative interference by most Federal agencies and the general public. Some of these specific religious exercise problems have been remedied by specific legislation, such as the return of the sacred Blue Lake to the Taos Pueblo people in New Mexico, which legislation was signed into law in 1970 by President Nixon, who also issued Executive Order 11670 to return the sacred mountain called Mount Adams to the Yakima Indian Nation in Washington State, which is to the west of the Cascade Mountains. This area, which is a traditional holy place to most of the Yakima people, was erroneously included in the U.S. forest system in 1908 by President Roosevelt. I would ask that this Executive order be included in the record at this point.

Mr. EDWARDS. Without objection, so ordered.

[The information follows:]

Executive Order 11670

May 20, 1972

**Providing for the Return of Certain Lands to the Yakima Indian
Reservation**

In 1855, the United States entered into a treaty with the Yakima Tribe of Indians. The treaty created a reservation, generally described by natural landmarks, for the exclusive use and benefit of the Tribe. Over the years, there have been continuing disputes regarding the true location of the reservation boundary.

In 1897, President Cleveland created by proclamation the Mount Rainier Forest Reserve in an area near the western boundary of the Yakima Reservation. In 1908,¹ President Theodore Roosevelt extended the boundary of that Forest to include a tract of some 21,000 acres, then mistakenly thought to be public land. The tract is included within a larger area now called the Gifford Pinchot National Forest. In 1942, a portion of the tract was designated the Mount Adams Wild Area, and this portion has been administered since 1964 for the public benefit under the Wilderness Act.

In 1966, the Indian Claims Commission found that this tract had originally been intended for inclusion in the Yakima Reservation. However, the Commission does not have authority to return specific property to a claimant; it may only grant money damages. Accordingly, the Tribe sought Executive action for return of its land.

The Attorney General has at my request reviewed the specific history and background of this particular case, including the principles which govern the taking of land by the United States and the question of whether this particular land was so taken. In a recent opinion.

¹ Mount Rainier Forest Reserve was established by Proclamation 725 of March 2, 1907.

the Attorney General has advised me that, in these exceptional and unique circumstances, the land was not taken by the United States within the meaning of the Fifth Amendment and that possession of this particular tract can be restored to the Tribe by Executive action.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly 16 U.S.C. 473, it is ordered as follows:

SECTION 1. A portion of the eastern boundary of the Gifford Pinchot National Forest is modified as follows:

Beginning at the point on the main ridge of the Cascade Mountains, where the Yakima Indian Reservation boundary as located by the 1926 Pecore survey from Goat Butte intersects said main ridge; thence southwesterly along the main ridge of the Cascade Mountains to the summit or the pinnacle of Mount Adams, as shown on the diagram of the Rainier National Forest attached to the Presidential proclamation of October 23, 1911,¹ 37 Stat. 1718; thence southerly along a divide between the watersheds of the Klickitat and White Salmon Rivers as shown on the 1932 Calvin Reconnaissance Survey Map (Petitioner's Exhibit No. 4, Docket No. 47, Indian Claims Commission) to its intersection with the north line of Section 34, Township 7 North, Range 11 East, Willamette Meridian.

SEC. 2. The Secretary of the Interior is directed to assume jurisdiction over the tract of land heretofore administered as a portion of the Gifford Pinchot National Forest and excluded from the Forest by Section 1 of this order, and to administer it for the use and benefit of the Yakima Tribe of Indians as a portion of the reservation created by the Treaty of 1855, 12 Stat. 951.

SEC. 3. Any prior order or proclamation relating to the tract of land affected by this order, to the extent inconsistent with this order, is hereby superseded.

RICHARD NIXON

THE WHITE HOUSE,

May 20, 1972.

¹ EDITORIAL NOTE: Proclamation 1170.

Ms. HARJO. Thank you very much.

Because of these and other site-specific actions, many people in the House of Representatives and in the Senate and in the administration viewed the American Indian Religious Freedom Act as a bill to return the Western Hemisphere to the Indians. This feeling is reflected in the House floor debate on July 18, 1978. I would like to make a correction here—in my written testimony I say that 88 Members of the House voted against this bill. There were only 81 voting nay. It was taken up under suspension, and there were 337 voting aye, with 14 not voting, and all Members who voted on this subcommittee, I would like to point out for this record, voted aye, including yourself, Mr. Chairman, Mr. Hyde, Mr. Kastnermeier, and Mrs. Schroeder. Among those voting nay were the current Director of the Office of Management and Budget, Mr. Stockman.

The act is a reminder of the Federal responsibility to guard against actions that would prohibit the free exercise of religion, anyone's religion. This constitutional commitment was reaffirmed in 1978 for American Indians because special problems require special attention. This does not mean that Indians have superior rights in this or any area, simply different problems, different histories, and different circumstances, especially due to the fact that our rights are so interwoven into the Federal fabric.

Courts have consistently ruled that the constitutionally protected rights of Indian governments and Indian people do not interfere with the constitutionally protected rights of non-Indian Americans, but that they are different. The Supreme Court spoke to this point in the 1979 decision regarding the treaty fishing rights of Indians in the Pacific Northwest in the case of *U.S. v. Washington* (Washington State Commercial Passenger Fishing Vessel Association et al., No. 77-983—decided July 2, 1979.)

In this decision, the Supreme Court ruled on the side of the Indians and the United States against the State of Washington and upheld the Indian rights to 50 percent of the harvestable anadromous fish for three purposes: commercial, or sale; subsistence, or food; and ceremonial, or religious. The Supreme Court rejected the Washington State argument that the Indians would be "supercitizens" if the Court so decided on the Indian side. The Supreme Court ordered the district court to take necessary remedial steps and to enlist the aid of the appropriate Federal law enforcement agencies in carrying out those steps, and also noted that the Indians' diet, trade, and religious practices centered on the capture of fish.

We as Indian people are not asking for anything that has not been done within the Federal framework for other religions and practitioners of other religions. Like consumer and other areas of Federal law where most of those whose rights are violated are unaware of remedies and can ill afford the expense of litigation, there is little incentive for voluntary compliance in the general population.

This area needs leadership. It needs that extra enforcement push and that spotlight on Federal actions. What this subcommittee can do is help focus that spotlight, if only as a reminder to the Federal agencies that this process is a continuing responsibility of the United States, not simply a project that ended in August 1979.

when the administration delivered to the Congress the report that I have provided to the committee.

In the Senate hearings there was quite a spotlight focused on the U.S. Customs Service and the problems that Indians encounter, primarily at the northern border regarding entry into the United States and back across the border for the purpose of attending religious ceremonies. Because of that spotlight being focused on the U.S. Customs Service, the Service made a determination to vigorously examine their policies and their practices. They found that, as had been told to the Senate, our elder medicine people had been harassed and had their medicine bundles exposed and destroyed by border guards at the northern border, as well as many other problems, including the problems that Indians encounter when attempting to take bodies of our dead people across borders so they may be viewed by those people who are considered Mexican and U.S. citizens and Canadian and U.S. citizens. When this situation occurs, as many as 29 agencies of the Federal Government come into play.

The Customs Service, because of their recognition of these problems, entered into dialog with Indian people outside the task force process and immediately sent out a policy to all Customs field offices, border guards, and other officials to let them know that this was policy of the United States, it was a special problem, and that the Customs Service should specially attend to it.

It was very important for such a dialog to take place between the Indian people and the Customs Service officials, and for other people involved in law enforcement especially, to know that within some Indian cultures, for example, it is considered rude to look people in the eye, which may appear sneaky to those unfamiliar with this style of behavior. It is important for law enforcement officials and others to understand differences of behavior, and it was important for Indian people to understand some of the law enforcement needs, particularly at the borders, that some of the behavioral and cultural oddities of Customs officials were the result of years of dealing with some of the worst abusers of our laws.

Once our Indian religious elders and the Customs Service policy and field people could sit down at a table and understand the problems of each other, they began to find solutions rather easily. Some of those solutions I am certain that Customs representatives could detail, and are highlighted in the report of 1979. One thing that was important for especially the law enforcement and Federal land management agencies to understand was the reaction to questioning and the reaction to harassment by Indian people, who are the products of generations of mistrust and fear, despite our inclination to walk gently through life.

The Customs Service also, following the task force process, prepared special books for their Customs officials at the northern and southern borders pertaining to individual Indian problems of access. This was a very important recognition of a need to continue educating and continue cooperating. In an imperfect world of imperfect laws and practices, I thought they did as perfect a job as possible.

One of the many other agencies I was impressed with was the Department of the Navy, which had particular problems involving military installations and access to those installations for the pur-

poses of carrying out religious ceremonies, and their inclusion on page 56 of the report I think is most instructive as to how they handled one such problem involving the Coso Hot Springs at China Lake Naval Weaponry Center. Both these agencies and many others approached this problem as U.S. policy that they were required to implement and that they were trying to find the best way to reverse many, many years of abusive practices—or, if not abusive, practices that occurred in an atmosphere of ignorance.

There may always be in this country those who throw pop bottles at our Indian young people who are involved in sacred vision questing time on public land, as has occurred to many of the Indian youth in my tribe, the Cheyenne and Arapaho Tribes of Oklahoma, and happened specifically to our past Arrow Keeper, who is the religious elder of the Cheyennes, and to his son. There may always be people who throw their trash in our churches and who abuse by their behavior our sacred and holy places. Congress cannot do anything about this. I would be most ashamed of any Indian person who throw trash in a church of any religion in this country or who drove a motor vehicle through a church picnic or who was disruptive or who did anything to disturb the confessional. In this same spirit, I would hope that most of the people in this country are ashamed of those people who do this in our churches and to our most private and religious ceremonies.

Congress can do nothing about this problem. Congress can remind the Federal agencies that they have a continuing responsibility in this area, and continue looking at areas of law that would help protect the Indian people, such as an act passed subsequent to the Indian Religious Freedom Act in 1979, called the Archeological Resources Protection Act, which strengthened the criminal penalties against pot hunters and grave robbers, and which allows our Indian people to have somewhat more relaxed feelings when leaving objects of beauty and importance and religious significance on the graves of our dead people. For those people who think that we are living in the past, our ancestors gave up much so that we could always be Indians and so that we could always live in the best of the past. The worst of the past is our present, unfortunately, and we are trying very hard—and with your help I think we will make this a reality—to keep the past from becoming prolog.

Thank you very much.

Mr. EDWARDS. Thank you very much, Ms. Harjo.

[The prepared statement of Suzan Shown Harjo follows:]

Native American Rights Fund

1712 N Street, N.W.
Washington, D.C. 20036
202-785-4166

STATEMENT OF SUZAN SHOWN HARJO, LEGISLATIVE LIAISON, NATIVE AMERICAN RIGHTS FUND, BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, WASHINGTON, D.C., JUNE 10, 1982

Mister Chairman and Members of the Subcommittee: My name is Suzan Shown Harjo. I am Cheyenne and Creek; my citizenry is in the Cheyenne and Arapaho Tribes of Oklahoma. I appear before you as Legislative Liaison for the Native American Rights Fund (NARF), which was established in 1970 as a non-profit, national Indian law firm, and which is headquartered in Boulder, Colorado, with an office in Washington, D.C. For the Subcommittee's information, I have provided copies of NARF's 1981 Annual Report, which discusses our current activities, including our involvement in matters concerning Indian religious freedom. -

I thank the Subcommittee for holding this series of hearings on Indian freedom of religion issues, and for inviting me to testify. This is the first hearing held in the House of Representatives on this issue since the late-1960s, when Congress considered the return to the Pueblo of Taos of their sacred Blue Lake (P.L. 91-550, approved on December 15, 1970). Deliberations on the Blue Lake legislation - as well as issues brought to light during consideration of the early-1970s Executive Order return of Mount Adams to the Yakima Nation and the mid-1970s changes in the Bald Eagle Protection Act regulations to accommodate Indian religious usage - formed the backdrop for a broad policy statement concerning Indian freedom of religion.

The American Indian Religious Freedom Act was introduced in the Senate on December 15, 1977, where it passed by voice vote on April 3, 1978, following hearings in the Committee on Indian Affairs. An amended version passed in the House on July 18, 1978, without hearings and with only 88 Members voting

may. The Act was approved by the President on August 11, 1978, to become P.L. 95-341, with a signing statement issued the following day, which reads, in part:

"It is a fundamental right of every American, as guaranteed by the First Amendment of the Constitution, to worship as he or she pleases. This act is in no way intended to alter that guarantee or override existing laws, but is designed to prevent government actions that would violate these Constitutional protections. In the past government agencies and departments have on occasion denied Native Americans access to particular sites and interfered with religious practices and customs where such use conflicted with Federal regulations. In many instances, the Federal officials responsible for the enforcement of these regulations were unaware of the nature of traditional native religious practices and, consequently, of the degree to which their agencies interfered with such practices. This legislation seeks to remedy this situation."

In passing the Act, Congress recognized that certain federal laws, policies and practices infringed upon the right of American Indian, Alaska Native and Native Hawaiian people to exercise their traditional beliefs and practices, despite the guarantees of the First Amendment of the Constitution. This Act and other Indian legislation of the 1970s were discussed in the following way in the Commission on Security and Cooperation in Europe's 1979 report on domestic compliance with Principles VII and VIII of the Helsinki accords:

"The religious practices of American Indians are an integral part of their culture, tradition and heritage and form the basis of Indian identity and value systems. To guarantee Indian rights in this regard, the American Indian Religious Freedom Act was signed into law....The Act proclaims that it is the policy of the U.S. to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise their traditional religions, including, but not limited to, access to sites, use and possession of sacred objects and the freedom to worship through ceremonies and traditional rites.

"....A review of U.S. policies and practices with respect to Native Americans shows that they are neither as deplorable as sometimes alleged, nor as successful as one might hope. In some areas,

federal policies and programs have failed to achieve permanent solutions to the serious problems facing tribes and their citizenry. In other areas, appropriate remedies have achieved notable progress in meeting the unique needs of Native American governments and individuals. The efforts to find solutions to Indian problems is made more difficult by the highly complex governmental, economic, social and political context surrounding Indian life. The important consideration, especially in terms of U.S. obligations under the Helsinki Final Act, is that serious efforts are being made.

"....To further fulfill U.S. obligations under the Helsinki accords regarding the rights of American Indians, the Commission believes the U.S. Government should energetically pursue the more equitable policy lines established in recent years and should continue to help increase public awareness of the unique nature of American Indian rights."

--"Fulfilling Our Promises: The United States and the Helsinki Final Act" (Report of November, 1979, pages 163-164)

Section 2 of the Act mandated a year's evaluation of federal policies and procedures, "in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices." It also called for a report of administrative changes and recommendations for legislative action. The Report, which is included in the submissions to the Subcommittee, was delivered to Congress in August of 1979, with a full accounting of some 50 federal agencies' efforts to reconcile policy and practice in both specific cases and overall operations. The Report contained promises of subsequent regulations, procedural changes, legislative proposals and an Executive Order on the subject.

Today, nearly three years after that study's completion, not one recommendation for legislative action has been advanced, and few regulatory or procedural changes have been made. The draft Executive Order meandered through the system briefly and, in the closing days of the previous Administration, was buried

in the Bureau of Indian Affairs, where it languishes today. The lack of administrative and congressional policy-level attention to the issue following completion of the Report sent a signal to the bureaucracy that it could return to business as usual.

For some 200 years prior to the Act's passage, federal business as usual in this area had resulted in the banning of several Indian ceremonies, the ruination of many sacred sites and the forced religious conversion of Indian children through the federally-sanctioned division of boarding schools amongst various non-Indian missionizing groups. The historical introduction to the 1979 Report to Congress addresses this tragic chapter in America's history, which proved devastating and irreversible for many Native American peoples. This period of history is traced to its beginnings in the earliest days of contact between people of Europe and people of this hemisphere:

"The Spanish, uncertain about the theological status of the Natives, and to make certain that conquests proceeded according to Christian principles, adopted the famous "Requirement," which had to be read formally to the Indians they encountered before any hostilities could commence. The Requirement began with a brief history of the world since its Creation, continued with an account of the establishment of the Papacy and described the donation by Pope Alexander IV of the lands then occupied by the Indians to the kings of Spain. The Indians, after hearing these sacred words, were supposed to acknowledge the lordship of the kings of Spain and to allow the Christian faith to be preached to them. Failure to surrender to the Spanish by the Indian justified whatever cruelties then followed and made the ensuing war theologically proper...."

--American Indian Religious Freedom Act Report, Federal Agencies Task Force, Chairman, Cecil D. Andrus, Secretary of the Interior (August 1979, page 1, Introduction - Historical Overview)

In the early part of this century, during more enlightened times, the U.S. Indian Affairs Commissioner published a communique to all field offices, noting that the "sun-dance and all similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective

penalties are provided." The Commissioner observed that:

"An examination of the latest reports of Superintendents on the subject of Indian dances reveals encouraging conditions, indicating that they are growing less frequent, are of shorter duration, interfere less with the Indian's farming and domestic affairs, and have fewer barbaric features; that they are also generally more orderly because better supervised than formerly. On a number of reservations, however, the native dance still has enough evil tendencies to furnish a retarding influence and at times a troublesome situation which calls for careful consideration and right-minded efforts.

"....These suggestions are offered with a view to drawing the attention and efforts of our Service towards a better control of Indian dancing so far as it retains elements of savagery or demoralizing practices. I feel that it is within our power to accomplish more than we are doing for the Indian's social and moral elevation, not by offending his communal longings or robbing his nature of its rhythm, but by encouraging those instincts to serve his higher powers and by directing his desires and purposes towards the things he needs to make him strong and capable and fit to survive in the midst of all races."

--Chas. H. Burke, Commissioner, April 26, 1921 (Reprinted in "The Denial of Indian Civil and Religious Rights," The Indian Historian, 1975, Vol. 8, No. 3, pages 43-46)

Native American dances and ceremonies are no longer specifically banned, and such outmoded directives and regulations have been overturned. However, even in the 1980s, there are federal officials who have an 1880s understanding of this area of United States law, history and policy. One such example is contained in a late-1981 memorandum from the Controller Designee of the U.S. Department of Education to the Deputy Under Secretary for Management, the subject of which is not Indian religion, but the management aspects of an Indian-controlled college in California. Apropos of nothing in the memo, its author makes the following gratuitous comment concerning a ceremonial area on the campus:

"This area is the stage for the annual sun dance

attended by upwards of 700 people representing various Indian tribes. It should be noted that the sun dance has been outlawed by most states because of its violence and savagery."

This statement is in factual error. Most states do not have Indian populations that practice the Sun Dance. No state has a law on the books that prohibits this religious ceremony, which is actively practiced in Oklahoma, North and South Dakota, Idaho, Montana, Wyoming and several other states wherein reside Indian peoples who have the Sun Dance as part of their tradition and culture. The State of California has a law on the books protecting Indian people from governmental interference in the free exercise of their traditional religions. This law served as the model for the American Indian Religious Freedom Act.

While the education official's statement does not represent the most serious, most recent, most insensitive or most common example of the problems Indians encounter today in attempting to assert their inherent, legally-protected rights, it serves to illustrate certain attitudinal problems Indians find in dealing with federal agencies on this issue, and it serves as a reminder that the art of government is crafted by individuals, despite the United States' advances as a nation of laws, not men. Nowhere in the federal structure is this more evident than in the interpretation, implementation and practical effects of the vast body of federal Indian law, which regulates and proscribes the activities of Native American governments and people to a greater extent than any other people or governments within the United States boundaries.

Remedial action on the part of the federal government to preserve and protect the religions it once sought to destroy is complicated by the very nature of these religions. Most Native religions have strict laws regarding the communication of information about rituals, stories and ceremonial events. These religious canons may also contain behavioral restrictions difficult to observe in modern times under modern regulations

and practices. Native religions are not conversionary in nature, and their legitimate leaders and practitioners do not missionize or broadcast a message to those outside the religion. Inhibited by the experience of history, practitioners of Native religions approach with caution, at best, dealings with government officials and the general public on these matters. The natural reluctance to discuss religious beliefs and practices is increased by Native religious practitioners' encounters with offensive and repugnant actions in regard to: 1) religious objects, whose care and ritual use are carefully set forth in traditional customary law, and which are often mishandled and abused by museums, private collectors and pot-hunters; 2) religious beliefs, which are frequently caricatured in the classroom and in the media; and 3) religious sites, where Native religious tenets impose a particular standard of behavior, and which are subjected to inappropriate behavior, garbage dumping and even destruction.

For these reasons, and because of the general lack of knowledge of Native religions, an essential element of the American Indian Religious Freedom Act was the mandate to conduct the federal study in consultation with Native traditional religious leaders. To better assure the integrity of this aspect of the federal study, the Interior Department contracted with NARF and the American Indian Law Center (AILC) of the University of New Mexico's School of Law to conduct a parallel study, working with an advisory board of Native religious leaders and practitioners. During this time, I served as Special Assistant for Legislation and Liaison in the Office of the Secretary of the Interior, which appointment I resigned in August of 1979 to return to NARF. I coordinated the multi-agency review, the task force consultation process and the preparation of the Report; these activities are described at pages 18-50 of the Report. Drafts for the Report were prepared by a committee of the task force and by the AILC/NARF project,

whose drafters included Vine Deloria, Jr., a Standing Rock Sioux attorney, historian and author; Sam Deloria, Standing Rock Sioux and AILC Director; Walter Echo-Hawk, Pawnee attorney; Victoria Santana, Blackfeet attorney; Parker Sando, Jemez Pueblo attorney; Tabitha Armstrong, Creek attorney; Kurt Blue Dog, Sioux attorney; and Charles Primeaux, Ponca/Osage paralegal. The drafts were carefully reviewed and rewritten by the policy, legal and program offices of the task force member agencies, with final editing and approval by the appropriate solicitors and general counsels, as well as the Office of Management and Budget.

During this period of implementation of Section 2 of the Act, valuable lessons were learned by Native and non-Native and government and private participants, with each gaining an appreciation for the nature of the problems of the others and for the range of possible solutions. Steps were taken to identify specific and categorical problems and to determine whether or not authority existed for agencies to make changes to overcome these problems. Where the agencies determined that authority did exist, most entered into negotiations with the affected Native Americans, and general policy changes were considered. Where authority did not exist, most made recommendations for changes in authorization, while some preferred to maintain the status quo.

Many agencies did not respond to the Interior Secretary's request for participation in the review, and others declined the opportunity to do so because, in their view, the Act was not germane to their mandates and functions. Certain of these agencies altered their initial response when convinced that their actions did affect some aspect within the scope of the Act; other agencies remained unconvinced. As the process was undertaken as voluntary and self-declaratory, those agencies in the latter category were not required to participate. A listing of responding agencies and discussion of task force organization can be found at pages 19-25 of the Report.

The U.S. Customs Service and the Department of Navy approached the project with exemplary discipline, dealing most

constructively with the task of attempting to accommodate the Native religious needs in light of border and national security needs. Their efforts resulted in specific agreements and procedural changes, as did those of the Bureau of Land Management. These and several other agencies undertook their task in terms of implementing a national policy that calls for a balancing of sometimes competing and equally compelling interests, with all possible steps to be taken to assure that no agency action would cause further degradation of Native American religions.

Some other agencies - with less weighty matters than border and national security issues to consider - approached the project in terms of challenging the Act's policy, and attempted to find ways to leave discriminatory practices in place and reopen policy matters through litigation. Still other agencies misunderstood the mandate of Section 2 of the Act, approaching the project as an exercise or extension course in comparative religions, rather than as a study to determine how to remove federal barriers standing in the way of the free exercise of Native American religious beliefs and practices. A few of the individual reviewers and commentators reacted to the process in surprisingly personal, emotional ways, with several characterizing the Act as a threat to their non-Native religions. Several anthropologists on the task force were able to provide a context within which to view the project from their own discipline:

"To the community being served we owe respect for its dignity, integrity, and internal variability. We should be constantly aware that it may not be possible to serve the interests of all segments of the community at the same time that we serve the interests of the contracting agency. Therefore, we should not recommend any course of action on behalf of our employers' interests when the lives, well-being, dignity, and self-respect of any portion of the community are likely to be adversely affected, without adequate provision being made to insure that there will be a minimum of such effect and that the net effect will in the long run be more beneficial than if no action were taken at

all. We should take the greater care to protect our respondents especially in the area of confidentiality which they may not be able to stipulate for themselves."

--from the "Statement of Professional and Ethical Responsibilities" of the Society for Applied Anthropology, March 13, 1974

Several of the individual reviewers, primarily non-attorneys, viewed the study and administrative changes, as well as the Act itself, as a violation of the Establishment Clause of the Constitution. This view was not a formal view of the Administration, and was one considered and rejected by Congress in passing the Act. As a non-attorney, it was and is difficult to understand how the federal government could "establish" religions so uniquely tied to this land for so many generations preceeding the establishment of the federal government and the Constitution, which states that treaties shall be the supreme law of the land. Nowhere in any federal treaty did any Indian nation or person agree to relinquish their religious prerogatives - in fact, the reservation of this right can be found in most treaties - and it is unthinkable that any provision could be construed to imply that the Indians would give up so basic a right as the freedom to believe and exercise their religions. It is because the federal government, by its actions and by inaction, abridged the Native American religious rights - often resulting in destruction of sites, objects and whole peoples - that this Act was passed. It may be viewed as remedial legislation in the mold of the Indian Health Care-Improvement Act of 1976, P.L. 94-437, which called for special attention to improve a condition that resulted, in large part, from past federal actions that have been the subject of thousands of congressional studies, hearings and investigations.

The result of this process of review, debate and exchange of ideas, theories and experiences was substantive administrative change, with promises of further review, change, legislative proposals and an Executive Order. These changes and

commitments can be found at pages 51-87 of the Report. A review of these changes and commitments was prepared by the AILC/NARF project, and is attached to this testimony. This summary lists each participating agency and the actions taken and commitments made. Unfortunately, most of the commitments made have not resulted in actions taken, especially with regard to the legislative proposals and Executive Order.

Because this matter affects the constitutional rights of Native Americans and because several federal agencies have not complied with the Act or met their own goals, it is appropriate for this Subcommittee to hold oversight hearings regarding Indian freedom of religion issues and federal implementation of the Act, calling witnesses from federal agencies that do not ordinarily relate to this Subcommittee. I thank the Members for their examination of these matters, and for providing the opportunity for us to help develop a record in this important area. Thank you.

ATTACHMENT 1.—STATEMENT OF SUZAN HARJO

The Facts of History

THE DENIAL OF INDIAN CIVIL AND RELIGIOUS RIGHTS

The facts of history cannot be escaped, and the three documents published here reveal the ignoble story of the role of the United States in denying Indians the right to practice their traditions, their religion, and their customs, and in effect the attempt to destroy what remained of Indian culture. The situation has certainly changed. Today even some representatives of the United States Congress take part in a few traditional observances of the Native Americans.

These documents, however, explain the continuing growth of racism, prejudice, and denial of rights of the American Indians. Such evidence may explain in part why our textbooks are still filled with inaccuracies and prejudice, for these things die hard. Indians still must struggle against such infringements of their religious freedom as is exhibited in the documents, and the general public still retains all too much of the prejudices fostered by the United States and its agencies. Such infringement of Indian religious and traditional rights continued well into the 20th century, and is still being confronted today.

The First Document

Dated April 26, 1921 (Circular No. 1665) the document comes from the Department of the Interior, Office of Indian Affairs, Washington, and is titled *Indian Dancing*. The text follows:

To Superintendents:

An examination of the latest reports of Superintendents on the subject of Indian dances reveals encouraging conditions, indicating that

they are growing less frequent, are of shorter duration, interfere less with the Indian's farming and domestic affairs, and have fewer barbaric features; that they are also generally more orderly because better supervised than formerly. On a number of reservations, however, the native dance still has enough evil tendencies to furnish a retarding influence and at times a troublesome situation which calls for careful consideration and right-minded efforts.

It is not the policy of the Indian Office to denounce all forms of Indian dancing. It is rather its purpose to be somewhat tolerant of pleasure and relaxation sought in this way or of ritualism and traditional sentiment thus expressed. The dance *per se* is not condemned. It is recognized as a manifestation of something inherent in human nature, through which elevated minds may happily unite art, refinement, and healthful exercise. It is not inconsistent with civilization. The dance, however, under most primitive and pagan conditions is apt to be harmful, and when found to be so among the Indians we should control it by educational processes as far as possible, but if necessary, by punitive measures when its degrading tendencies persist.

The sun-dance and all similar dances and so-called religious ceremonies are considered "Indian Offences" under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any dance which involves acts of self-torture, immoral relations between the sexes, the sacrificial destruction of clothing or useful articles, the reckless giving away of property, the use of injurious drugs or intoxicants and frequent or prolonged periods of celebration which bring the Indians together from remote points to the neglect of their crops,

livestock and home interests; in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare. In all such instances the regulations should be enforced, but only through the exercise of thoughtful discretion and mature judgment, after patient advisory methods have been exhausted. Among these methods should be the efforts of the superintendent to reach an understanding and agreement with the Indians to confine their dances and like ceremonies within such bounds as he may with reasonable concession approve; an arrangement for careful supervision at such gatherings, and provision as far as possible for sanitary dance places with decent surroundings, and something in the way of wholesome, educational entertainment that will tend to divert interest from objectionable native customs. The moral influence of our schools must of course go far towards fixing the standards of individual virtue and social purity that should be able to strengthen preparation with missionary activities in the attraction of the Indian to a higher conception of home and family life, and to the dignity and satisfaction of his personal labor and attainments. It seems to me quite necessary to Indian progress that there should be no perversion of those industrial and economic essentials which underlie all civilization, and that therefore meetings or convocations for any purpose, including pleasurable and even religious occasions, should be directed with due regard to the every-day work of the Indian which he must learn to do well and not weary in the doing, if he is to become the right kind of a citizen and equal to the tests that await him.

These suggestions are offered with a view to drawing the attention and efforts of our Service towards a better control of Indian dancing so far as it retains elements of savagery or demoralizing practices. I feel that it is within our power to accomplish more than we are doing for the Indian's social and moral elevation, not by offending his communal longings or robbing his nature of its rhythm, but by encouraging those instincts to serve his higher powers and by directing his desires and purposes towards the things he needs to make him strong and capable and fit to survive in the midst of all races.

I shall hope that Superintendents will give some special thought to this subject with a view to developing a line of action that will in the

next few years reduce to the minimum all objectionable conditions attending Indian dances or ceremonial gatherings.

(3122)

Respectfully,
CHAS. H. BURKE
Commissioner

The Second Document

Dated February 14, 1923, the document comes from the Department of the Interior, Office of Indian Affairs, is titled "Indian Dancing, Supplement to Circular No. 1665," and is addressed to the Superintendents. The text follows:

At a conference in October, 1922, of the missionaries of the several religious denominations represented in the Sioux country, the following recommendations were adopted and have been courteously submitted to this office:

1. That the Indian form of gambling and lottery known as the 'ituranpi' (translated 'give away') be prohibited.
2. That the Indian dances be limited to one in each month in the daylight hours of one day in the midweek, and at one center in each district; the months of March and April, June, July, and August be excepted.
3. That none take part in the dances or be present who are under 50 years of age.
4. That a careful propaganda be undertaken to educate public opinion against the dance and to provide a healthy substitute.
5. That a determined effort be made by the Government employees in cooperation with the missionaries to persuade the management of fairs and 'round-ups' in the towns adjoining the reservations not to commercialize the Indian by soliciting his attendance in large numbers for show purposes.
6. That there be close cooperation between the Government employees and the missionaries in those matters which affect the moral welfare of the Indians.

These recommendations, I am sure, were the result of sincere thought and discussion, and in view of their helpful spirit, are worthy of our careful consideration. They agree in the main with my attitude outlined in Circular No. 1665 on Indian dancing.

Probably the purpose of paragraph 2 can be

better fulfilled by some deviation from its specific terms according as circumstances or conditions vary in different reservations. Likewise, the restrictions in paragraph 3 may reasonably depend upon the character of the dance, its surroundings and supervision. I would not exclude those under 50 if the occasion were properly controlled and unattended by immoral or degrading influence.

The main features of the recommendations may be heartily endorsed, because they seek lawful and decent performances free from excess as to their length, conduct, and interference with self-supporting duties; because they urge cooperation towards something better to take the place of the vicious dance, and because they suggest the need of civilizing public sentiment in those white communities where little interest is taken in the Indians beyond the exhibition for commercial ends of ancient and barbarous customs.

After a conscientious study of the dance situation in his jurisdiction, the efforts of every superintendent must persistently encourage and emphasize the Indians' attention to these political, useful, thrifty, and orderly activities that are indispensable to his well-being and that underlie the preservation of his race in the midst of complex and highly competitive conditions. The instinct of individual enterprise and devotion to the prosperity and elevation of family life should in some way be made paramount in every Indian household to the exclusion of idleness, waste of time at frequent gatherings of whatever nature, and the neglect of physical resources upon which depend food, clothing, shelter, and the very beginnings of progress.

Of course, we must give tact, persuasion, and appeal to the Indian's good sense, a chance to win ahead of peremptory orders, because our success must often follow a change of honest conviction and surrender of traditions held sacred, and we should, therefore, especially gain the support of the more enlightened and progressive element among the Indians as a means of showing how the things we would correct or abolish are handicaps to those who practice them. We must go about this work with some patience and charity and do it in a way that will convince the Indian of our fidelity to his best welfare, and in such a spirit we may welcome cooperation apart from our Service, especially from those whose splendid labors and sacrifices are devoted to moral and social uplift everywhere.

The conditions in different reservations or sections of the Indian country are so unlike in important respects that I hesitate to attempt improvement by an administrative order uniformly applicable, so am, therefore, sending with this an appeal to the Indians of all our jurisdictions to abandon certain general features of their gatherings, as indicated, and to agree with you as to the general rules that shall govern them.

I feel that it will be much better to accomplish something in this way than by more arbitrary methods, if it can be done, and therefore desire you after one year's faithful trial to submit a special report upon the results with your recommendations.

The accompanying letter should be given the widest publicity possible among the Indians, and if necessary additional copies can be supplied for that purpose.

Please acknowledge the receipt hereof.

(4999)

Sincerely yours,
CHAS. H. BURKE,
Commissioner

The Third Document

(This is the "letter" referred to by Commissioner Burke which the superintendents were instructed to distribute "among the Indians," and "with widest publicity.")

To All Indians:

Not long ago I held a meeting of Superintendents, Missionaries and Indians, at which the feeling of those present was strong against Indian dances, as they are usually given, and against so much time as is often spent by the Indians in a display of their old customs at public gatherings held by the whites. From the view of this meeting and from other information I feel that something must be done to stop the neglect of stock, crops, gardens, and home interests caused by these dances or by celebrations, pow-wows, and gatherings of any kind that take the time of the Indians for many days.

Now, what I want you to think about very seriously is that you must first of all try to make your own living, which you cannot do unless you work faithfully and take care of what comes from your labor, and go to dances or other meetings only when your home work will not suffer by it. I do not want to deprive you of

decent amusements or occasional feast days, but you should not do evil or foolish things or take so much time for these occasions. No good comes from your "give-away" custom at dances and it should be stopped. It is not right to torture your bodies or to handle poisonous snakes in your ceremonies. All such extreme things are wrong and should be put aside and forgotten. You do yourselves and your families great injustice when at dances you give away money or other property, perhaps clothing, a cow, a horse or a team and wagon, and then after an absence of several days go home to find everything going to waste and yourselves with less to work with than you had before.

I could issue an order against these useless and harmful performances, but I would much rather have you give them up of your own free will and, therefore, I ask you now in this letter to do so. I urge you to come to an understanding and an agreement with your Superintendent to hold no gatherings in the months when the seed-time, cultivation of crops and the harvest need your attention, and at other times to meet for only a short period and to have no drugs, intoxicants, or gambling, and no dancing that the Superintendent does not approve.

If at the end of one year the reports which I receive show that you are doing as requested, I

shall be very glad for I will know that you are making progress in other and more important ways, but if the reports show that you reject this plea, then some other course will have to be taken.

With best wishes for your happiness and success, I am

February 24, 1923

Sincerely yours,
(signed) CHAS. H. BURKE
Commissioner

Aside from the presumptuous, paternalistic, and dictatorial contents of these documents, is the fact that they cannot be understood merely as a denial of Indian rights, rights to which all human beings are entitled. Conditions of those times will reveal that the Native Americans had little or no livestock, that those who did always made arrangements to have their stock cared for during their absence, that farming implements were not available and indeed most of the land was not suited to farming; hence there was widespread "idleness" due to indescribable poverty. The dances to which Commissioner Burke refers were generally of a religious nature, and such observances were prohibited (see his references to the "Code of Indian Offences"), due to the racist nature of the whole Indian Service, well into the 20th century. ■■■■

ATTACHMENT 2.—STATEMENT OF SUZAN HARJO
SUMMARY OF THE ADMINISTRATION REPORT ON
THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT
DELIVERED TO CONGRESS ON AUGUST 21, 1979

Prepared by:

American Indian Law Center
1117 Stanford, N.E.
Albuquerque, New Mexico
Telephone: (505) 277-5462

and

Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Telephone: (303) 447-8760

I. INTRODUCTION

The Indian Religious Freedom Act Report was delivered to the Congress on August 21, 1979, as the Act itself requires:

Sec 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

The purpose of the Act is to change federal policy toward Native American religious practices. The first part of the Act says:

... it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.

A policy is a general principle that the government follows in managing particular situations. In cases where the law is unclear, where there is no law, or where there are two laws conflicting, the policy is supposed to show what tendency or direction Congress wants the administration to follow. A new policy, even one declared by Congress itself, does not change

other laws. But is a new policy is compatible with other laws, it can change how the other laws work.

This summary of the report is intended to help Indian, Native Hawaiian and Native Alaskan religious leaders and others make use of the report. The page numbers in parentheses refer to pages in the report.

How the Federal Government Views Native Religions

In the President's report, the administration is saying that they are now and will continue to be respectful and sensitive towards Native religions. They admit that they were not always like this in the first part of the report, the introduction (p. 1-16). When the President signed the religious freedom act in August of 1978, he said:

In the past government agencies and departments have on occasion denied Native Americans access to particular sites and interfered with religious practices and customs where such use conflicted with Federal regulations. In many instances, the Federal officials responsible for the enforcement of these regulations were unaware of the nature of traditional native religious practices and, consequently, of the degree to which their agencies interfered with such practices.

The report was prepared by a Task Force representing a number of different agencies and departments (listed on p. 24). All the reports of the individual agencies have been included as appendix B of the report. Besides consulting with Native American religious leaders in small meetings (including the Board of Advisors of the Indian Religious Freedom Act

project), the Task Force held a series of hearings early last summer. The problems presented at the hearings have been included as appendix C of the report.

In the second part of the report, the agencies and departments summarized what they have done so far under the Act and what they will do in the future (p. 26). One of the major results of the Act is that Indian religious concerns have been identified. Each agency or department now knows that problems or concerns exist, and somewhere in each bureaucracy a person exists to deal with them.

The third part of the report contains two different types of recommendations. The first type of recommendations are for "Uniform Administrative Procedures," so that all the Native concerns about land, sacred objects, etc., are handled in basically the same way by all agencies. The Task Force has recommended that these recommendations be issued by the President as an executive order to all the agencies, and the process to make the executive order has already begun. The second set of recommendations are suggestions for legislative changes. These recommendations are now being studied inside the administration, and the actual wording for each law change will eventually be sent to the Congress.

The administration has decided that most problems or concerns about the practice of Native American religions can be solved through Administrative Accommodation. This means that they can be taken care of by fitting them into procedures

or practices that already exist, without having to ask Congress to pass new laws. It also means that the administration has decided that Native American religious views of federal property is compatible with the other uses of federal property so that no special laws are needed to allow the religious use. So the attitude of the government toward Native American religions has officially changed and now the government is going ahead and changing how each agency acts to accommodate the Native American religious interests. The Act itself changed the government's policy, its attitude towards Native religions, but it didn't change any other laws.

The report assumes that the agencies will be able to form relationships with the Native Americans affected by their practices, so that most concerns can be handled locally, at what they call the field level. Probably this relationship will be involved in handling Native religious issues.

The following parts of this summary include:

1. a description of what each agency has done and what they have promised to do;
2. an explanation of the Uniform Administrative procedures requested by the Task Force;
3. an explanation of the legislative changes requested by the Task Force.

II. ACTIONS TAKEN AND COMMITMENTS MADE BY INDIVIDUAL AGENCIES

A. LAND

The most important way that the federal land holding agencies will take care of any problems with the use of federal lands will be through the land planning process. Most pieces of federal land now have or will soon have a detailed plan of how the land will be used. Once Native American religious use of that land is included in the plan, then it will be taken into account whenever anything is to be done affecting that land. Most of the agencies have decided that the people in charge of their cultural resources programs will be the ones most involved in this.

Land problems will also be dealt with through the Environmental Impact Statement (EIS) process. This will apparently be used because it is already in place. Whenever certain actions are planned affecting federal lands, an EIS is prepared which tells what the effect of the action or alternative actions will be on the environment. Some agencies will now also include the effect of the action on the practice of Native American religions.

1. Forest Service (Department of Agriculture)

Actions Taken

- Internal Task Force was formed (p. 26)
- Interim policy was issued (p. 26):

Native traditional religious leaders to be notified and invited to all public involvement activities;

If religious issue is identified, it will be included in the cultural resource overview document for the area;

Indian religious issue is examined and consultation with natives is made;

Indian religious needs incorporated into the Land Management plan of the area;

Indian religious use requests are to be carefully considered, including requests for use of restricted area.

- Manual revision (p. 27): Cultural Resources section of manual now includes Indian Religious Freedom Act concerns;

- Several regional meetings with local religious leaders were held.

Commitments Made:

- Manual change: Civil rights and "permit" sections will be rewritten to consider Indian religious needs (p. 27);

- Potential conflict areas such as permit requirements, closure orders and cultural resource management will continue to be reviewed with traditional religious leaders or their representatives (p. 27).

2. Department of Energy

Actions Taken

- Has identified protection of sacred sites as a potential problem (p. 27);

- Local level consultation with Tribal and religious leaders.

Commitments Made

Process that is being considered to avoid infringing on Indian religion (p. 27):

- likely to be integrated into established environmental review process;

- likely to apply to both substantial involvement by DOE or the authority for DOE's activity on the site;

- process:

a. investigation;

b. consultation;

c. preparation and examination of alternate plans:

DOE will not go against Indian religious interest unless there is a compelling government interest (this balancing test will be done by DOE's environment section which is structurally separate from its major programs).

d. decision reviewed by Inter-governmental Secretariat in DOE;

e. decision reviewed by Secretary;

findings and justification published and notice given to religious leaders.

3. Bureau of Land Management (Department of the Interior)

Actions Taken:

- Native religious use will be incorporated into land use plans (p. 33);
- Inventory of sacred sites and gathering areas within California Desert Conservation Plan area has been carried out in close consultation with Indians (p. 58).

Commitments Made:

- BLM's Cultural Resource Program will continue to evaluate relevant policies and procedures and develop methods to include Native religious concerns in land use planning and management (p. 33).

4. National Park Service (Department of Interior)

Actions Taken:

- Special directive 78-1 issued committing NPS to deal with Native religious concerns (p. 35);
- Assessment of NPS and Native religious concerns have been prepared and is now being studied at the Park level (p. 55);
- Has held consultations with Native Americans on these issues (p. 44);
- Many park areas have waived fees (p. 44);
- All regions now have coordinators to serve as liaisons with Native Americans (p. 44).

Commitments Made:

- Recommendations for future action are being prepared in consultation with Native Americans (p. 35);
- Where necessary or practicable bad impacts on Native religion will be avoided or minimized through alternative actions (p. 35).

5. Department of the NavyActions Taken:

- In May of 1979, a message was sent to all naval stations advising them to give deliberate consideration to religious concerns of Native Americans (p. 35);
- An agreement has been signed with the Owens Valley Paiutes and Shoshones permitting religious use of Coso Hot Springs on the China Lake Naval Weapons Center (p. 56).

Commitments Made:

- Diligently working to allow access to Kahoolawe, Hawaii, in a manner which is both safe to the participants and not disruptive to the Navy's mission (p. 35).

6. Tennessee Valley AuthorityActions Taken:

- Taking steps to incorporate religious concerns into environmental reviews;
- Consideration of Native religious concerns is being factored into land management and planning functions.

Commitments Made:

- Will continue to evaluate its activities and procedures (p. 42).

3. LAND-CEMETERIES

This section deals with how remains of Native Americans uncovered on federal lands will be treated.

The Administration continues to recommend enactment of either the House or Senate version of the "Archeological Resources Protection Act of 1979" under the Recommendations for Congressional Consideration section of the report at pages 63 and 81. The purpose of this Act is to secure for the present and future benefit of all the American people the protection of archeological resources and sites which are on public and Indian lands.

1. Bureau of Land ManagementActions Taken:

- Developed draft procedures for processing and evaluating Antiquity Act permit applications:

An Environmental Analysis Record must be conducted in order to ascertain the effect of the proposed action, provide for Native input during the process, encourage permit applicants to consult with local Native religious/tribal/group leaders prior to submittal of an application,

attach a stipulation to all permits that if human remains are encountered, all work must stop and the BLM be notified, and Natives must be contacted and consulted (p. 66).

2. Heritage Conservation and Recreation Service - Interagency Archeological Services (IAS)

Actions Taken:

- Requires field officers to consult with relatives or tribal governments in those cases where remains can be identified when human remains are disturbed by federal construction (p. 65);

- Has initiated a review of its relevant policies and procedures to determine possible impacts upon religious practices and beliefs of Natives (p. 34).

Consultation with Native American is also now required by:

- a. The Army Corps of Engineers (p. 65);
- b. The Tennessee Valley Authority (p. 65).

C. SACRED OBJECTS

1. Fish and Wildlife Service (Department of Interior)

Actions Taken:

- Evaluated procedures in consultation with Native Americans (p. 34);

- Religious awareness program for care of eagle carcasses has been instituted (p. 34);
- Instituted policy making available excess buffalo for Native religious ceremonial purposes (p. 57);
- Indian use of protected species will be administratively accommodated (p. 72);
- Taking steps to address concerns that State fish and game laws may not protect native religion (p. 69).

Commitments Made:

- Buffalo allocation policy will be developed and implemented in continuing consultation with Indian traditional religious leaders.

2. Customs Service (Treasury Department)

Actions Taken:

- Policy statement issued September 18, 1978, sent to make all officers aware of Act and to ensure sensitive handling of religious items (p. 36);
- Established Customs Indian Affairs Committee, which has had four meetings with Indian people (p. 37);
- News release on Customs information sent to Indian newspapers (p. 37);
- Local Customs representatives designated to serve as contact point for Indian concerns.

Commitments Made:

- Preparing reference manual of natural objects used in Native religion for Customs officers;
- Preparing booklet on Yaquis for Customs use, may serve as a model in other areas.

3. Drug Enforcement Administration (Justice Department)Actions Taken:

Difficulties in obtaining peyote for Native American religious use may be relieved administratively by allowing traditional Indian religious harvesting of peyote on federal lands in the southwest and allowing the importation of peyote from Mexico for native religious use (p. 70).

Commitments Made:

DEA will continue to consult with practitioners about the availability of peyote (p. 70).

D. SACRED OBJECTS/MUSEUMS1. Department of Army, Navy and Air ForceActions Taken

- Departmental museums are presently reviewing their holdings to identify Native sacred objects (p. 78);
- When such objects are identified Native leaders will be notified and invited to discuss its return, loan, care and handling (p. 78).

2. Institute of Museum Services (Department of Health, Education, and Welfare)

Actions Taken:

- Currently evaluating its policies and procedures to determine compliance with 95-341 (p. 29).

Commitments Made:

- Proposes a survey to determine the extent of museum holdings that would be claimed by Native American religious leaders (p. 78).

3. American Folklife Center

Actions Taken:

- Wax cylinder recordings made early in century will be made available to Native Americans (p. 40).

4. National Endowment for the Humanities

Actions Taken:

- Establishing an internal agency task force to monitor and promote 95-341 in new agency policy and grant application guidelines (p. 42).

2. CEREMONIES AND TRADITIONAL RITES

1. Indian Health Service (Department of Health, Education, and Welfare)

Actions Taken:

- Recognition of traditional healing (p. 29);
- Staff instructed to inform patients of right to practice Native religions (p. 30);
- IHS will assist in accomodating Native religions (p. 30).

Commitments Made:

- Each area office will consult with Native Americans regarding treatment and disposal of bodies, body parts and fetuses;
- IHS staff will be aware of, sensitive to and respectful toward traditional belief.

2. Bureau of Indian Affairs (Department of Interior)

Actions Taken:

- 25 C.F.R. 31.(a) now recognized religious rights of BIA students (p. 32);
- In the process of developing regulations for implementation of the National Historic Preservation Act and other statutes relating to cultural resources (p. 32).

Commitments Made:

- To develop a plan to accommodate employee's religious rights;

- To study religious rights of students in BIA schools.

3. Commission on Civil Rights

Actions Taken:

- Publication revised to expand coverage of Indian religious discrimination issues (p. 41).

4. Bureau of Prisons (Department of Justice)

Actions Taken:

- Native religious freedom is being accommodated administratively (p. 86);

- A policy statement is being prepared on native religious freedom (p. 87);

- A special liaison team has been established as a clearinghouse on the subject (p. 87);

- Prisoner placement and transfer criteria has been modified regarding native religious and cultural needs (p. 87);

- Sweat lodges on a test-basis, other ceremonies and religious items are permitted (p. 87).

5. Housing and Urban Development

Action Taken:

- HUD is revising its regulations to provide for building homes which reflect traditional and cultural factors (p. 85).

III. TASK FORCE RECOMMENDATIONS FOR UNIFORM ADMINISTRATIVE PROCEDURES

These are the recommendations which would form part of the proposed Executive Order. Although the order has not yet been issued, these recommendations carry weight as task force statements. A short explanation follows each quoted recommendation.

A. LAND

1. "First, each federal agency can accommodate Native American religious practices to the fullest extent possible under existing federal land and resource management statutes. This accommodation could be reflected in each agency's regulations, policies and enforcement procedures with regard to access to federal land areas, gathering and use of natural substances endowed with sacred significance by Native American religious groups, provisions for group and individual activities on federal lands and any other appropriate subject matter." (p. 62)

Explanation - This is the recommendation to allow Native American religious practices on federal lands under existing law. It would apply to all land-managing agencies, not just to the ones that have already promised to do so. These practices would be recognized and eventually provided for in each agencies manuals.

2. "Each federal agency can also revise existing regulations, policies and practices to provide for separate consideration of any Native American religious concerns prior to making any decision regarding use of federal lands and resources." (p. 63)

Explanation - This recommendation is important to make sure that the religious concerns are considered separately from the other concerns which also affect federal land like environmental or historical matters.

3. "The appointment of American Indians, Alaska Natives and Native Hawaiians to existing boards, commissions and other citizen advisory groups affecting federal land and resource planning, management and practices should be considered by federal agencies. Each federal agency could determine whether it would be appropriate to create new boards, commissions and other citizen advisory groups designed specifically to assure adequate consideration of Native religious concerns in federal land and resource planning, management and practices." (p. 63)

Explanation - These boards are the way for people outside of the agency to influence the agency's policies and planning. If Native religious interests are now officially recognized the government, then this is a good way to make sure that the government is aware of them.

4. "To the fullest extent allowed under existing statutory authority, each federal agency can reserve and protect federal areas of special religious significance to Native Americans in a manner similar to its reservation and protection of areas of special scientific significance. They can also provide exemptions from restrictions on access to and gathering, use and possession of federal property for Native American religious purposes similar to those provided for scientific purposes." (p. 63)

Explanation - Certain areas of land will be set aside for Native American religious use under this section. How this will be done depend on what policy the agency has to set aside land for scientific purposes.

as this is the example which will be followed.

5. "Finally, whenever any federal agency cedes jurisdiction for any purpose to a state, it can reserve federal jurisdiction over Native American land and resources use by Native Americans for religious purposes." (p. 63)

Explanation - It is a common practice for the federal government to give states jurisdiction over some federal lands, especially for hunting and fishing. This section would make sure that the federal government kept jurisdiction over land and religious practices used by Native Americans.

B. SACRED OBJECTS

1. "To further enable Native Americans to gather and use sacred objects, it is the recommendation of the Task Force that the Secretaries of Interior, Agriculture, Commerce and Treasury should establish a joint uniform set of administrative procedures to govern the disposition of surplus wildlife and plants or parts thereof which have been confiscated or gathered under the jurisdiction and control of the respective Secretaries. To the fullest extent allowed under existing statutory authority, the uniform procedures should be designed to increase the availability of natural products to Native American practitioners of Native traditional religions." (p. 71)

Explanation - As many of the natural substances used in Native American religions are rare and hard to get, this recommendation would allow Native Americans to get surplus and confiscated plants, minerals, and animals or animal parts for religious use.

2. "It is the recommendation of the Task Force that, when crossing the borders of the United States, Native Americans carrying articles for use in the Native traditional religions should be treated with respect and dignity and, to the extent permitted under existing statutory authority, according to their own religious laws. It is also recommended that, insofar as is possible, the United States Customs Service should assist Native Americans with problems encountered with counterpart agencies of other countries in regard to Native religious practices (p. 75)."

Explanation - This section would make sure that Customs officials treat sacred objects carefully when they pass the border. The Customs Service would also help Native Americans with problems with Customs Services of other countries.

C. SACRED OBJECTS/MUSEUMS

1. "Federal museums should decline to acquire for their collections objects known to be of current religious significance to American Indian, Aleut, Eskimo or Native Hawaiian traditional religions, and should inform such Native American tribal and religious leaders of the presence on the market or in non-Native hands of such objects as come to their attention." (p. 81)

Explanation - This section would stop federal museums from receiving any object of current religious significance to Native Americans, and would oblige them to contact the tribal or religious leaders when the museums find out about any such object being offered for sale.

2. "Federal museums should return to the tribe of origin objects in the museum's possession, as to which unconsenting third parties assert no ownership interest, that were used or valued for religious purposes at the time of their loss from an American Indian tribe or Native American community contrary to standards for disposition of such objects then prevailing in that community, provided that the successor or modern tribe or community requests them as needed for current religious practices." (p. 81)

Explanation - This section would require federal museums to return sacred objects if all of the following conditions are met:

- a. No other person (third party) has any claim to the object;
 - b. The object was used or valued for religious use at the time it left the Native Americans;
 - c. The object was taken from the community in violation of tribal or customary law;
 - d. The tribe or community requests that the object be returned for religious use.
3. "Federal museums should consult traditional Native religious leaders for guidance as to the museums' practices regarding exhibition and labeling, conservation, and storage of Indian, Eskimo, Aleut, and Hawaiian sacred objects in their possession." (p. 81)

Explanation - This section would require the federal museums to ask the traditional religious leaders how to take proper care of the sacred objects.

4. "Federal museums should facilitate periodic ritual treatment by appropriate religious practitioners of sacred objects in their possession, at the request of such practitioners." (p. 81)

Explanation - This section would allow Native Americans to enter the federal museums and take care of any regular religious treatment needed by the sacred objects in the museums.

IV. TASK FORCE RECOMMENDATIONS FOR CONGRESSIONAL CONSIDERATION

These are the subjects recommended for new laws, they are being studied by the government now. They are not yet in the form of written laws. Possibly, hearings will be held by Congress on these subjects in the future:

A. LAND

"[The recommendations for congressional consideration will] concern federal land-use designation for areas containing sacred sites or shrines of the Native traditional religions, and site-specific federal land statutes which do not allow for Native religious use of federal property or federal land. The Task Force is also concerned about protecting information concerning sensitive Native religious matters and sacred sites given to land-managing agencies, similar to the provisions of 16 U.S.C. 470a(4). The enactment of S. 490 or H.R. 1825 is urged as both bills contain provisions for confidentiality with respect to these sites." (p. 63)

Explanation - Eventually the administration will probably suggest new laws for:

1. a new type of landholding for sacred areas;
2. changing the specific law on any federal land

- area which stops Native Americans from doing something religious there, such as hunting, gathering or worshipping;
3. allowing the withholding of information from the public about native sacred land areas and sites, just like such information is sometimes withheld about sites on the National Registry of Historic places;
 4. protecting burial sites if current proposed legislation does not pass. (see p. 67).

B. SACRED OBJECTS

"The Task Force has developed legislative recommendations concerning the tariff schedule of the United States, the export by non-Native Americans of sacred objects, and the Jay Treaty." (p. 75)

Explanation - These laws will deal with:

1. entry of religious items free of duty;
2. limit export of sacred objects or the selling of them to persons or institutions outside this country;
3. free passage of Native Americans at the border and duty free entry of Native American's possessions.

C. SACRED OBJECTS/MUSEUMS

"The Task Force has developed legislative recommendations concerning theft or other unauthorized removal from Indian or Eskimo lands of objects of current religious significance to occupants to those lands; the export of important items of the Native American patrimony, sacred and other; the interstate transport or receipt of stolen Native American religious items; and the intentional conversion, theft, sale and possession of sacred objects belonging to Native Americans not presently protected by 18 U.S.C. 1163." (p. 81)

Explanation - New laws are being considered on the following topics:

1. theft or removal of sacred objects from Native lands;
2. sacred objects leaving this country;
3. the taking of stolen sacred objects across state-lines and receiving stolen sacred objects;
4. the taking of sacred objects by someone who has a right to hold it but not to keep forever or sell it, and the stealing, sale and possession of sacred objects which are not easily defined as tribal property.

V. CONCLUSION

Now that these federal agencies and the President have told Congress that Native American religious concerns will be preserved and protected as the law requires, it is up to the Native American religious practitioners to test these statements

against reality, always remembering that the Federal Government has now declared itself willing to resolve these issues through consultation.

If you have had any difficulty understanding this summary, or if you have any questions, you should feel free to contact the Native American Rights Fund at (303) 447-8760 or the American Indian Law Center at (505) 277-5462.

For a copy of the entire administration report, contact:

Assistant Secretary of the Interior
For Indian Affairs
U.S. Department of the Interior
Washington, D. C. 20240

Mr. BREAUX. Mr. Endreson.

STATEMENT OF DOUGLAS ENDRESON, ATTORNEY, SONOSKY, CHAMBERS AND SACHSE, ON BEHALF OF THE DEVILS LAKE SIOUX AND ASSINIBOINE AND SIOUX TRIBES OF FORT PECK RESERVATION

Mr. ENDRESON. Thank you, Mr. Chairman.

My name is Douglas Endreson. I am appearing today on behalf of the Devils Lake Sioux Tribe of Fort Totten, ND, and the Assiniboiné and Sioux Tribes of the Fort Peck Reservation, MT.

I would first like to thank the Chair for permitting me the opportunity to testify this morning on this proposal, and I would like to join in the suggestion made by other representatives of the panel that the Chair afford other tribes and Indian religious leaders the opportunity to testify concerning this proposal.

I think the Chair's interest in this subject has gotten the ear of the Indian world, and I think when that is done, the question then for all of us is what is to be made of that opportunity. I am here to testify, to offer the views of these two tribes on what can be done with it.

I have submitted a written statement which I will not read, but I would like to summarize from it, and then I would be happy to respond to any questions that the Chair or other representatives of the panel might have.

I have attempted to make two points in the statement. The first is simply a restatement of the policy of the Congress, the policy of the administration, and the policy which the courts have recognized to since at least 1968, and that is, that the core of the relationship between Indian tribes in the United States is the government-to-government relationship.

Treaties form an important part of that core. These treaties recognize that, in exchange for Indian land and resources, the tribes reserve certain rights.

A part of the sovereignty of Indian tribes today includes the treaties—the treaties that were the subject of the *Dion* case, the treat-

ties that are the subject of a number of cases. Tribes today have the power to regulate the exercise of those treaty rights by their members. That power is vested exclusively in the tribal government.

The policy which the Congress has followed of self-determination, of recognizing the tribes' powers of self-government, is also one that makes a lot of sense practically. Indian tribes control a vast amount of land in this country. Tribes are the closest government to how that land is used and how those resources are used or taken.

Tribal government has the greatest familiarity with the culture of the people, including their religion. Tribal government is the government which has a system for gain and resource management which is available for use to protect the resources of the reservation.

The proposed amendment would have the effect of abrogating treaty rights. It also would potentially infringe on the practice of Indian religion. I know of no two subjects that are of greater importance to the Indian tribes of this country.

The tribes share the interest in conservation that is reflected in the Endangered Species Act. The tribes share the benefits of the first amendment that everyone in this country enjoys. Tribes have attempted to work with the Government, through the government-to-government relationship, to solve problems of joint interest.

Other proposals that are before the Congress involve tribes working with the Environmental Protection Agency to protect water, to protect the land from toxic wastes. I would suggest that this same opportunity exists in this subject area, that the tribal regulatory authority ought to be relied upon in the first instance to resolve problems which are thought to exist.

I think when we begin to talk about the problems that might exist, it is important to get a clear understanding of what those problems are. I think that is what the act is about, getting a clear understanding of what the status of these species is and then taking appropriate action.

The *Dion* case, I believe, is a case which is strongly supportive of the conservation interest reflected in the Endangered Species Act and the conservation interest supported by Indian tribes.

First, let me say what I think the *Dion* case is not. The *Dion* case is not a decision that says that Indians can take eagles or other endangered species because they claim a religious purpose to the taking. The *Dion* case involves the rejection of a claim of an individual defendant that a commercial taking was for a religious purpose. The rejection was a factual determination made by the court. Indian religious leaders testified in opposition to the claim.

No one can control how a criminal defendant manages his defense. Our system gives him the right to make such assertions as he thinks can be supported. Indian religion should not bear the brunt of an unsuccessful, rejected defense premised on a claim of religious freedom as was made in that case.

The *Dion* case also rejects the notion that Indian takings under the Yankton treaty are authorized for commercial purposes. The problem that was involved in the sting was not the taking but the buying. The buyers, the market, created the problem which was re-

sponded to by that operation. Interestingly enough, the court of appeals, in the May 20 decision, the followup decision, noted that the biggest part of the market during the 2½ years that the sting was an operation which was created by Fish and Wildlife agents.

I think the Dion case indicates that there is one area—the taking authorized by treaties—where the responsibility is put on tribes to take action to protect these species as they have historically. I think the record of Indian resource management is a solid one. I think it is a record which the committee, the Congress in the United States, can look to with confidence.

Indians did not create the problems that the act responded to. The fact that certain species are taken represents a designation of those species as sacred, not as waste, not as a subsistence resource, and that use ought to be preserved. The treaties which found the relationship between the tribes and the United States ought to endure, as they have since their making.

If the proposed amendment is enacted, it will snatch those rights and subject religious freedom to a scheme that is untested and likely to infringe on those rights. I think the history of the relationship between the tribes and the United States indicates, if nothing more, that the tribes ought to have an opportunity to address the problem that is thought to exist and an opportunity to respond to it using the powers which they have today.

I appreciate the opportunity to have expressed these views, and I would again indicate that I think that the Indian community is willing to listen and to work to resolve the kinds of problems that have been discussed by the witnesses on both panels today.

Thank you.

[Prepared statement of Mr. Endreson follows:]

PREPARED STATEMENT OF DOUGLAS B. L. ENDRESON

My name is Douglas B.L. Endreson. I am a partner in the law firm of Sonosky, Chambers and Sachse of Washington, D.C. I appreciate this opportunity to testify and express the views of the Devils Lake Sioux Tribe of Fort Totten, North Dakota, and the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana with respect to the proposed amendment to the Endangered Species Act ("ESA"). As I understand it, the proposed amendment would subject Indian tribes and Indian people to the ESA and would create a permitting scheme for the taking of endangered species for religious purposes.

At the outset, I would suggest in view of the tremendous importance of the subject matter of the proposed amendment—specifically its impact on treaty rights and religious freedom—that all tribes be afforded an opportunity to present their views on it. The protection of these rights is a matter of the highest priority for Indian tribes and Indian people. Accordingly, I would respectfully suggest that field hearings be held in Indian Country to hear these views. I am confident that the testimony at such hearings would show that the protection of plant and animal species on the reservation is a primary concern of Indian tribes and Indian people, and that the taking of certain species for religious purposes is not inconsistent with the ERA but instead reflects a designation of these species as sacred.

The two Tribes for whom I appear today oppose the proposed amendment for two reasons. First, the Tribes have not been presented with information which would show that such an amendment is needed. If treaty takings or takings for religious purposes pose a threat to endangered species the Indian tribes should be told of the problem and should then be afforded an opportunity to respond to it through the exercise of existing tribal authority. Neither the treaty obligations of the United States to the Indian tribes, nor the First Amendment rights of Indian people should be the subject of legislation when existing law can resolve demonstrated problems in these vital cases. For this reason, the Tribes oppose the unilateral abrogation of

treaty rights and the placement of restrictions on the practice of Indian religion which the proposed amendment would produce.

These are severe steps which, if taken here, would damage both the government to government relationship between the Indian tribes and the United States and the policy of tribal self-determination to which the United States is committed.

The status of Indian tribes under tribal and federal law gives the tribes the authority to resolve problems with a nexus in the exercise of treaty rights or the practice of Indian religion.

The Devils Lake Sioux Tribe and the Assiniboiné and Sioux Tribes are both federally recognized Indian tribes who maintain a government to government relationship with the United States. The Constitution and Bylaws of both Tribes empower their tribal governing bodies to regulate the treaty right to hunt and fish on the reservation. Constitution and Bylaws of the Devils Lake Sioux Tribe, Article VI, Section 10; Constitution and Bylaws of the Assiniboiné and Sioux Tribes, Article VII, Section 5(c). Indeed, as a matter of federal law, tribal jurisdiction over the exercise of treaty rights by tribal members or the reservation is exclusive.

The belief and practice of religion in the traditional manner is a part of life on both reservations. Freedom of religion for all persons subject to the jurisdiction of the Tribes is guaranteed by federal law. The same freedom is, of course, guaranteed as against action by the federal government by the First Amendment to the United States Constitution.

Thus, the tribal government on both reservations is responsible for regulating treaty rights and protecting religious freedom on the reservation. A part of this responsibility is protecting plants and animals, including endangered species, found on the reservation.

The tribal government's intimate familiarity with the religion and culture of the tribe, and the territory of the reservation, enable it to fulfill this responsibility as no other government could do.

The importance of this unique capability is seen particularly in the area of religious freedom. The belief and practice of religion varies among the tribes. An understanding of the beliefs and practices of a particular religion is necessary to protect the rights of its adherents to freely practice that religion. Such an understanding is particularly important to preserving religious freedom for those whose practice of religion is tied inextricably to plants or animals sacred to the practitioner. Without such an understanding the balance necessary to protect the practice of religion and species conservation can easily be upset.

Indian tribes have managed this responsibility since time immemorial and history shows their competence in handling it.

The protection and enhancement of endangered species on Indian reservations properly belongs within this well established framework of tribal authority. The biological and territorial component of the protection of endangered species strongly favors a system which has the understanding necessary to identify the problem, the capability to respond quickly and the power to regulate effectively.

And for these reasons, concern for the protection and enhancement of endangered species should, in the first instance be addressed to the tribal government.

However, unless and until these concerns are presented to tribal government these governments cannot respond. In this instance, nothing has been presented to the tribes to show that taking of endangered species by tribal members in the exercise of treaty rights, or first amendment rights, has threatened these species. And the Eighth Circuit's recent rejection of a claimed commercial right to take such species and of a freedom of religion defense of the same premise lessen the likelihood of this occurring in the future. *United States v. Dion* 752 F.2d 1261 (8th Cir. 1985). If such problems are believed to exist the concerns should be made known to the Tribes so that consultation and discussion on a government to government basis can follow.

It is not clear why an effort to enlist tribal support in the protection and enhancement of endangered species has not been made the ESA's administrators. Indeed, even where consultations have been required—as it the case in the area of religious freedom—such consultations have not occurred at the level necessary to achieve success. The American Indian Religious Freedom Act, 42 U.S.C. § 1996, essentially requires federal agencies to acquire an understanding of Indian religion and to work with the Indian religious community to protect the First Amendment Rights of Indian people. This kind of knowledge and understanding is obviously necessary if Indian religious freedom is to be protected. The Act's responsibilities, however, have not been fulfilled.

Whatever the reasons may be, it is certain that the Tribes are not responsible for the fact that they have not been consulted or included in the efforts to protect and enhance endangered species.

The question is, then, whether tribal treaty rights should be abrogated and Indian religious freedom jeopardized when the Indian tribes whose rights are at stake have not been afforded the opportunity to hear and respond to what the problems are thought to be.

Treaties are the supreme law of the land. By their execution the United States recognized the sovereignty of the Tribes and their rights of self-government. Treaties between the Tribes and the United States form a part of the core of the government to government relationship between the Tribes and United States. They represent the commitment of the United States given in exchange for vast amounts of Indian land and resources. To abrogate these rights without presenting the problem to the affected tribes would ignore the obligations of these treaties and the principles of self-government on which federal Indian policy is based.

Indian religious freedom would also be jeopardized by such a course. Indian religions are different from tribe to tribe. The permit system the proposed amendment would create makes no effort to accommodate such differences. It would, instead, establish a uniform system which could easily fail of its purpose.

There is no reason now to suppose that these damaging results must follow. Tribal authority to resolve identified problems in this subject area is firmly established. And I urge the Subcommittee to see that concerns in this area are presented to the tribal government before action is taken, and to rely on the authority of the tribes to address such problems.

Mr. BREAUX. Thank you.

Mr. Pena, you are next.

STATEMENT OF GILBERT M. PENA, CHAIRMAN, PUEBLO TRIBES OF NEW MEXICO

Mr. PENA. Thank you, Mr. Chairman.

On behalf of the All Indian Pueblo Council and the Pueblos of New Mexico, I want to thank you for giving us this opportunity.

Since time immemorial, the Pueblo Indians have respected and given the highest consideration to the land, water, plant, and animal life as a vital part of our traditional and religious activities and ceremonies. This very day, back home, certain activities are taking place that are for the benefit of all mankind.

In February 1978, then-Senator Abourezk, in his call for the protection of Indian religious practices, said, "America does not need to violate the religion of her native peoples."

On August 11, 1978, Joint Resolution 102, the American Indian Religious Freedom Act, was enacted. There it was, and I quote:

Resolved that the Senate and House of Representatives of the United States of America in Congress assembled; that henceforth it shall be the policy of the United States to protect and preserve for the American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The possession of sacred objects includes the possession and use of eagle feathers. The performance of various dances and other religious ceremonies requires the use of eagle feathers. Our very existence as a people is dependent on the continuation of our ceremonies and traditional rites.

Despite previous efforts by three governments—Spain, Mexico, and the United States—and by missionaries from several denominations, the Pueblo people have preserved and continued their belief and culture.

The All Indian Pueblo Council and the member tribes support the protection of endangered species, just as we are adamant about the preservation of our lands, the environment, our water and its quality. We do not support any legislation that will prohibit us from using eagle feathers, nor will we adhere to a permit system that will require us to identify our religious leaders or explain the purposes of our ceremonies.

In closing, Mr. Chairman and members of the subcommittee, no one in this great land would appreciate anyone banning the use of holy water, the eucharist, the altar, or any other object of one's religious beliefs. Neither do we as Pueblos want the banning of our religious objects such as the eagle feathers, prayer sticks, purifying pouches, or plants that are needed in the continuation of our way of life.

Governor Garcia mentioned that the eagle feather is like a Bible, and someone in the first panel mentioned that there are 12 individual feathers in the tail. Well, essentially analogous to that would be the various books of the Bible, Mr. Chairman.

In closing, we are willing to work with the committee in trying to identify ways and means to assist us in the problem facing us here today.

Thank you very much.

Mr. BREAUX. I thank all the members of the panel for their presentations. I assure you that all of you have been asked here so that we may hear your testimony and try to work together on a solution.

I have no problems with anyone's religious practices. They, certainly, do not have to agree with mine or with anyone else's. That is very, very important. I, certainly, don't mind if part of the religious ceremonies or religious beliefs is to honor and revere eagles. I just don't want the last eagle killed. It is very simple.

I don't want to lecture you because my point is to ask questions of this panel, and I will proceed to that. I just don't think that any government that is composed of laws, if we have a conservation practice, should allow any organization or group to take the last species of a particular animal or waterfowl or what have you, and that is the purpose of the Endangered Species Act.

I object to Alaska Natives taking bowhead whales. If they are endangered, I don't think they should be taken for any reason. I don't think Native Americans should be allowed to take endangered species of bald eagles for any reason. My concern is, what are we going to do when there are no more eagles?

If every group and organization had the belief that we ought to honor eagles by killing them and taking their feathers, then we are not going to have any eagles left. The only thing I am trying to do is come up with a program that conserves a species that is truly endangered. If it is not endangered, I have no problem with taking it for any purposes, like I don't have any problems taking ducks and geese; there are plenty of them. But when it comes to a species that is endangered—and we can argue about whether it is or it is not—but if it is endangered, I don't think it should be taken for any reason.

I would ask you, what is the problem, from everybody's perspective at the table, with the Department of the Interior's proposed

amendment which would allow Native American Indians to do something that no other category of Americans can do? Nobody would be able, except Native American Indians, to take an endangered species. Native Americans could take eagles for religious purposes and if it can be shown that it doesn't jeopardize the existence of that species.

That amendment would give Native American Indians something that no other category of Americans has—the right to kill an endangered species—and the only thing you have to show is that it is for religious purposes, which I think you can show. And the second thing, which I think is essential, that that killing of that endangered species does not threaten the very existence of the species that we are supposedly honoring by our religious practices. What is wrong with that? Anybody?

Mr. ENDRESON. Mr. Chairman, I think the problem with what you have proposed is that, first, it would accomplish that result by abrogating treaties between the tribes in the United States, and by—

Mr. BREUX. Why should a treaty give anyone in this country the right to jeopardize the very existence of a species that is in danger of becoming extinct?

Mr. ENDRESON. I think the treaty is a commitment between the United States and the tribes. I don't think that the *Dion* case, for example, posed the question of whether or not those takings would cause the eagle to become extinct, and I don't know of any tribe that takes the position that the treaty ought to permit them to take the last bald eagle.

Mr. BREUX. Then, why do you have a problem with an amendment which would clearly say that you have the right to take an endangered species—in this case the American bald eagle—and that you have the right, if you can show it is for religious purposes, which you have no problem showing, and if you also can show that the taking of that endangered species does not jeopardize the very existence of that eagle?

Mr. ENDRESON. I think that proposal would ignore the far greater possibility for enhancing the status of the bald eagle that is available through tribal regulation of the right, and also—

Mr. BREUX. What type of tribal regulations are conservation measures aimed at protecting bald eagles?

Mr. ENDRESON. For example, today many tribes prohibit commercial takings of any species for any purpose.

Mr. BREUX. I am not talking about commercial taking. The *Dion* case prohibits the commercial taking of bald eagles. I am talking about the taking for whatever reason, just because someone likes to shoot bald eagles, or because someone has a higher feeling about the religious significance of killing an eagle and doing something with the parts and feathers of that eagle.

Mr. ENDRESON. I think the existing sanction on many reservations is that the taking of something purportedly for religious purposes which is not necessary is one of the worst things that somebody can do to that culture and to that tribe.

I don't think there is any showing that there has been any kind of abuse or mistreatment by Indian people of that religious right. I

don't think that the system that is in force is one that has been shown to result in endangered species being wasted or taken.

Mr. BREAUX. The law of this country is that it is illegal to take an endangered species, period. That is a declaration of the Congress of the United States, that if a species is found, by biological evidence, that it is in such a delicate situation that it is threatened with the danger of becoming extinct, any taking of that species is illegal. That has already been determined.

The question I am asking you is: What is wrong with giving you an exception, which no other category of citizens would have, to allow the taking of an endangered species if you can show it is for religious purposes and that the taking does not jeopardize the existence of the species?

What you are saying is that you object to the second part of it. That means that you feel that you should be allowed to take an endangered species, even if it jeopardizes the very existence of that species. I cannot accept that.

Mr. ENDRESON. What I am saying, Mr. Chairman, is I think the tribe should have an opportunity to answer your question through the exercise of their regulatory powers, and I think the record today suggests that tribes would answer that question in the negative and say no, we don't want the treaty to mean that; the treaty doesn't mean that to us; and they would enact regulations that would prohibit others from trying to use it for that purpose.

Mr. BREAUX. The regulations under the Department of the Interior's amendment would allow for that. The very amendment that they are suggesting says, in essence, that Native American Indians would be allowed to take an endangered species if it is for religious purposes, and they could work that out with the tribes because the Department is not the sole expert as to what religious practices of Indians are. That has to be determined by meeting with religious groups such as the ones that you represent.

Second, it has to be determined that the taking is not likely to jeopardize the continued existence of the species. That has to be determined, too. That is numbers. How many can we allow anyone to take and not jeopardize the species? These things would be worked out sitting together until we come up with a number that would be an acceptable number to be taken.

I don't even like taking one, but what the Department is saying, we are going to allow you to continue to kill endangered species, but you have to show that it is not going to jeopardize the very existence of the species. Suppose we had two bald eagles left in this country? Surely, you would not argue the fact that you have the right to take it because it is for religious reasons.

Mr. ENDRESON. No; I don't think anybody would, Mr. Chairman, but I think that while the substance of what you are saying, it sounds to me, is something that most tribes would agree with. The point I am trying to make is that the government-to-government relationship and the treaties between the tribes and the United States suggest that that ought to be done within the framework of existing law, which gives the tribes the right to regulate and which has certainly provided the Fish and Wildlife Service and Department of the Interior with all the information that is necessary to

assist the tribes in seeing that power is exercised in a way that conserves the species.

I think that there is nothing wrong with what you are saying, as a matter of substance, but I also see nothing wrong with the government-to-government relationship, and I think that relationship is one which, in the long run, if it is allowed to prosper, is going to do much more to protect endangered species and resources on Indian reservations than is criminalizing, even if a limited exception is created, each aspect that is found to somehow infringe on the broad goals of the act.

Mr. BREAUX. Unless the law is amended in the eighth district of the Federal courts, I understand the ruling to be that there can be no regulation of Native Americans' taking and killing of an endangered species, as long as it is not done for commercial purposes.

Without an amendment, there are no restrictions in the eighth circuit on the taking and killing of endangered species. That is why I am saying that we have to do something in order to make sure that the species is not completely eliminated from the face of the Earth.

Congressman Young, do you have questions?

Mr. YOUNG. Thank you, Mr. Chairman.

I am interested in two things—well, more than two things. Have any of the councils or the tribes set up a supervisory or, in fact, recognized religious board, or a group that can direct who shall take the eagle for religious purposes?

Mr. SIDNEY. My name is Ivan Sidney from the Hopi Tribe.

Congressman, I can respond in this way. First of all, I cannot speak for all Native Americans, but the Hopis have a problem in the area of working through a permitting system. We have been taking eagles without permits for a long time and not endangering or causing the extinction of the species.

Traditionally, there are certain areas where individual members are allowed to go and no one else. There is a ceremony that we go through before it is taken. We use modern law enforcement techniques and today a law enforcement officer accompanies a religious group to ensure that the conservation practices are enforced.

Mr. YOUNG. This is interesting to me, because this is what we have done, Mr. Frank, in the Whaling Commission. The North Slope Whaling Commission is probably the best example of an ethnic group setting up a quasi-legal organization which actually issues the captain's permit—although we have now a renegade up there, and they will probably end up running him out of the town, on the whaling issue—but they operate who shall take the whale, how many strikes under the IWC will be allowed, so they do not exceed it, and it has worked out very well.

It is a working relationship, and I think it will be beneficial to this committee if we can see that there is actually an effort of the tribes to, if you wish to call it, police—or under a commission or under some type of tribal designation—who shall take the eagle.

I think the chairman makes a good point. An eagle that is worth \$1,000 is a very attractive monetary goal. Now, you may not agree with that. Like the young lady, Suzan, said, there are bad people on both sides. If we can see that type of activity taking place with those that utilize the eagle feathers, I think it would really be ben-

eficial to us. To my knowledge, we have not seen that on the committee.

Any of you can comment on that, please. Yes?

Mr. MERLE GARCIA. Mr. Chairman, I would like to remark to some of the questions that the chairman posed there a few minutes ago.

Mr. YOUNG. Well, wait a minute. I am not finished yet, so let's finish that, and then you can address the chairman. He has his time. He runs the gavel, by the way.

By the way, Mr. Frank, I can assure you, it is not just the oil companies; it is also some of your Northwest Senators that got involved in something that is none of their business as far as my Eskimos go about taking their whales, and I don't appreciate it.

There is one down there below Washington that is really a pain in the side, and he doesn't recognize the significance of the subsistence use and the utilization of that whale.

I made a statement, and I will probably get in trouble for it, as far as the taking of endangered species. The first people who would suffer the most would be those that use it. Consequently, the council has protected the whale, the bowhead whale, and we actually have proven we have more whales than we thought we had.

I get a little irritated when I see people following the pursuits of Greenpeace and other groups interfering with a group of people who actually have a better conservation role than any other Nation in the country.

The IWC continually tells us that we cannot take that 19 whales. For your information, I don't appreciate their endeavors in interfering with a group of people on my North Slope who are doing the job as I think should be done.

We have proven there are approximately 6,000 bowhead whales now. They, originally, said there were 1,500. They have set up the commission. They have the scientific community studying it, and they actually have proven themselves correct, and they have policed it. So, I am making that comment, and you might want to talk to your Senators.

We also have another issue coming up in my State. We have the Aleuts on St. Paul Island who want to harvest some seals, and legitimately so. Now, we have the same groups come out saying, Oh, we can't harvest these poor little seals.

Now, I am not saying this is necessarily for religious purposes, but I am going to say it is a carried on practice for the last 150 years. It is their way of life, and now I have Greenpeace and rest saying don't harvest the seals, including some of our Northwest Senators.

Again, if you have any influence with them, tell them to leave my people alone because they are not decimating the species. I got on my soapbox. Sorry, Mr. Chairman. [Laughter.]

Mr. BREAU. Mr. Thomas.

Mr. THOMAS. Thank you, Mr. Chairman.

I would just like to make a comment or two. I don't know if a question or a response will be prompted by it.

In coming up as a young boy who loved the out of doors, we oftentimes, before we began to understand the importance of the raptors, the birds of prey in this country, we shot them at will because

we thought they preyed on the game, the rabbits and quail and small turkeys and other things that we hunted. Then we finally began to realize what an important link they were in the evolutionary chain, in the food chain, and everything that was important to us.

I have been very pleased to hear comments like this made by you about the importance of life, and I know certainly people who come from the land and live on the land and live in close harmony with nature have an understanding and an affinity for that which is very rare, and I appreciate that.

But what I see—I am a landowner. I own land down in Georgia. I love to hunt. I am an avid hunter. I think my love of the out of doors is maybe close to a form of religion of my own, although it might not be recognized as a specific form of religion, and I believe in treating the game species and all with all proper and due respect and work very hard to see that they are propagated there on our lands, not for the purpose merely of hunting but so my own children can see them and learn from them because they are very different creatures than those that are depicted often in the Walt Disney films, which are highly inaccurate in some sort of fantasized ideas that they have about Bambis and other species.

But, at any rate, I guess what I want to say to you, I still would feel that there is another law and another higher order that we must listen to, and that is our learning and our knowledge that we gain now about species, the dangers that face them, the loss of habitat which is there whether you and I abide by every law or never take another single animal, the loss and the continuing loss of their natural habitat.

We saw DDT banned. One of the strongest cases for it was the damage it was doing to the eagle itself. So, we brought them back from the brink of extinction.

I simply have to be one who, although I appreciate all of the comments you have made—certainly your religious rights, the auspices of the treaties—and I think these are near to sacred as well. But, at the same time, I simply have to say that when we deal with an endangered species, I think that all of us must realize that that animal is not ours.

Mr. Frank, you mentioned talking to the eagle, and I was fascinated by your love and appreciation for it. Perhaps, if we asked him how he felt, he would certainly ask that we keep him on the endangered species list and he would ask that we protect his religious rights as well. But, of course, he does not have that ability.

But at the same time, I think my point to you is that we are all Americans. We are all people of this continent. And what we do to the eagle, whether it is on a set-aside area on a reservation, or whether it is on wild lands or on somebody's private land, to me that bears no significance. I think we all have to listen to the cry of the eagle, and that is that he is endangered, that he is a special creature, certainly a beautiful and wild thing that must be preserved for all time to come.

I think we must all then give up something in that effort. And even though I respect your religious rights, I think that they have to be put on the table as well. I would say to you that if it were my religion, and I believed the eagle to be truly endangered, and even

if I found that he nested only on my own land and I held it within my own power to determine his future, that if I were being told that what I did was in detriment to his future and his survival, then certainly I would relinquish all of those freedoms, because I have the same deep, abiding love for nature and the animals that I think you do as well.

And so I ask you to consider the thoughts of myself, and I am sure those are close to some of the other members up here, who are not just people who don't understand the out-of-doors and don't understand animals. We have a deep and abiding love and appreciation there.

So it puts us in a very tough spot. I simply have to say that since it is on the Endangered Species Act, then I think we all—all of us as Americans—must respect every effort to preserve that species.

I don't know if that provokes any comment or not, but I wanted to make those comments to you and thank you for your testimony.

Ms. HARJO. Sir, one thing that we all seem to be glossing over here is the conservation efforts and the enhancement efforts regarding several endangered and threatened species that are going on right now—some that have gone on for tens of thousands of years—but that are going on right now in Indian country. Because we have not detailed those, it seems that they are not being recognized as contributing to these populations.

The first thing that I think should be tried is to sit down with Indian tribes with an overlay map showing where the endangered species are, where the Indian lands are, where the migratory paths are. It is just possible that Indian tribes could help with endangered and threatened species that have proximity to their lands and other resources, even where the Indians have no religious significance attached to those species. There could be many opportunities here for enhancement beyond the immediate issue of the *Dion* decision and the eagle.

When you say that our religious rights can be thrown on the table, I don't think that you meant to suggest they could be thrown on the table first. They are the last things to be thrown on the table. That is what the Constitution recognizes.

We are told to work within a system. We are told to work within the rules. We do try to abide by those rules, and it is most distressing to see those rules being changed willy-nilly without full consideration of rights that we possess that are supposed to be paramount.

No Indian is suggesting that we have the right to take the last of anything, and we don't feel that Congress has the right to pursue the last traditional Indian to extinction, and we fear that is what is happening.

Mr. THOMAS. Again, if I might just have another moment to respond here, I certainly take everything you said at heart, and when I used the term "throwing it on the table," maybe I should have said simply the terminology we often use in putting it on the table, because all issues have to be discussed up here.

But at the same time, I revert back to a statement I made earlier. I think here that the point we are missing is it is really the eagle's rights that we are talking about. Now, who prevails? If we simply take the attitude that our beliefs and our perceptions,

whether they are religious or whether they come from our own convictions inside—which, to me, as I said, are probably very close but might not be recognized as religion—as to whether or not I will impose my own beliefs as to what effect what I might do does have in turn on a species of animal, or anything that I do, if I simply say that my law is the higher.

I think that is what we are doing here, and I think we are missing sight of the fact that it is really the eagle that we are talking about. It is his rights; it is his concern and his future. I think that comes paramount, and I do not think we have a right to impose our religious views, if I shared those views, over the rights of the eagle.

Now, let me just finish. I think we have all recognized the efforts that you have done on the reservations in the protection of species and working with the habitat there, and certainly we do. But my point is, you know, the eagle is a migratory bird. He is no different than a migratory water fowl that comes through my property or over my property.

If we take a certain area and say that here on this land my will is going to prevail, although he migrates from one end of North America to the other, then I think we have literally torn the heart out of the protective laws that we have tried to write and put in place concerning migratory or endangered species.

And so I think that is my point to you. Perhaps we will find a way to mediate. Perhaps there will be a way here in which we can reach some sort of compromise. But please don't take it as a lack of respect for your religious views. It is simply my pivotal belief that whatever we say about an endangered species in turn, in my opinion, has to provide to everybody who lives within this country where this endangered species resides, and if it does not, then we have no law.

Mr. MERLE GARCIA. Mr. Chairman and members of the committee, I could cite all the regulations like the U.S. Constitution, the Native American Religious Freedom Act, and all that. I think I understand from what you are saying, what do we do? Do we kill off the last eagle? Then where does the Indian tribe and its religion go?

I think that can be addressed in a different way. I was talking to the religious leader sitting beside me. I think the Indian religious leaders feel concern, just like you do, in what happens to the eagle.

The Pueblos in the Southwest, as I indicated—Acoma—have not had an eagle killed in the last 5 years. We realize that the eagle plays an important part in the tradition of Indian people.

As I stated, the Native Americans of this country were the first environmentalists. They know that the eagle is very important to us. I don't think we would be the ones that would be shooting the last eagle. I realize that we are going to have to do something, work together to preserve that endangered species.

But let us just compare. In Pocatello, ID, where a lot of bald eagles, golden eagles, are being electrocuted, maybe the electric companies of this country need to put out something that would not electrocute eagles.

I don't think the Indian people would go to the extent of killing off the endangered species. As I indicated a few minutes ago, it is

very, very important to us that we keep the endangered species alive.

With our process of open hearings out in Indian country, and addressing this to the religious leaders, I think we would be able to come through to set up a program in protection of this very important bird to us.

Thank you.

Mr. FRANK. Mr. Chairman, may I just have one second?

Mr. BREAU. Yes.

Mr. FRANK. I appreciate Mr. Young's statement. Just to kind of tell you a little bit about it, we have tribal courts, and we have our own judicial system. We do not have control over going to the ninth circuit court or to the eighth circuit court or to the U.S. Supreme Court.

In fisheries in the Northwest, we have been to the U.S. Supreme Court nine times and confirmed. The species, the salmon out there, will not take another time to the U.S. Supreme Court. The eighth circuit, or the ninth circuit, has made two different decisions in Indian country in our lives, something dealing with our people.

What we are saying is, how do we as Indian people control our lives? We will not participate in taking the last eagle or the last endangered species in any way. You can be assured of that. But how do we control the U.S. Senate and the U.S. Congress and people in general in this country that do not understand Indian people and want to abrogate our treaties in any way or form? And so they tell the U.S. Attorney General, take that case up; we might win.

It will be an abrogation of our treaties some way. It will be cutting down our rights some way. And it does. It surely does. Every time we go to any U.S. Supreme Court, or any court, our rights diminish a little bit, and that is all we are saying.

What we are saying is that we would like the cooperation. We can work with the Interior Department. There have got to be designated areas, endangered species or regions or wherever they are. Things can be worked out. That is all we are saying.

Thank you.

Mr. BREAU. I thank all of you for your testimony.

I would only comment that everybody's rights are restricted in some way. I have the right to hunt on my own property, but I do not have the right to hunt an endangered species on my own property. That is a restriction on my right to hunt and do what I want on my property. So there are restrictions that apply to everybody.

I would only suggest that you folks and your attorneys look at the suggested amendment which the Department of the Interior is suggesting because, No. 1, if the case is appealed to the Supreme Court, the Supreme Court could very well follow the other court decisions and the districts other than the eighth circuit court and say that legitimate conservation measures can restrict Indian treaty rights with regard to taking of species on reservations.

Those other courts have, said clearly that the Conservation laws can apply to Native American Indians' right to take certain species on Native American Indian lands. So what I am saying is that the Interior Department's amendment that they are suggesting here today gives you, I think, far more rights with regard to the taking

of endangered species—in this case, the eagle—than you would have by the decisions in other courts.

I would certainly suggest that if I were representing Indian interests as an attorney, I would certainly look very closely at the suggested amendment, because I think it gives you a lot more than some court decisions have allowed. It is something that you are going to have to make a decision on, but I would certainly offer that point for consideration.

With that, I thank all of this panel's people who have traveled to be with us today. It was good to hear from all of you. We have met many times before and certainly plan to continue to do so in the future.

This panel will now be excused, and we would like to welcome up our final panel for today, which will be Mr. Paul Lenzini, legal counsel representing the International Association of Fish and Wildlife Agencies, as well as Michael Bean, who is chairman of the Wildlife Program for the Environmental Defense Fund.

Gentlemen, if you would take your positions, we would be pleased to receive your testimony. Mr. Bean, we have your testimony. If you would like to go forward, we would be pleased to receive it.

STATEMENT OF MICHAEL J. BEAN, CHAIRMAN, WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE FUND

Mr. BEAN. Thank you very much, Mr. Chairman.

My organization, the Environmental Defense Fund, was formed some 6 years before the Endangered Species Act was passed. It was formed for one reason, and that one reason was to fight the use of DDT. Indeed, the single objective the organization had in 1967 was to bring about a ban in the United States on the use of DDT, because DDT was contributing to the endangerment of the bald eagle, the peregrine falcon, the osprey, and other American wildlife.

We succeeded in that effort in 1973 and secured a ban on nearly all uses of DDT in the United States. I feel certain that if DDT had continued to be allowed to be used as it was prior to 1973, it would eventually have brought about the extinction of the bald eagle, and with the eagle's extinction, it would have terminated both Indian treaty rights and Indian religious rights with respect to the eagle with a finality that neither this Congress nor any court could ever duplicate.

The slow recovery of the bald eagle can be dated from the banning of DDT. But other threats remain, threats less serious, perhaps, individually, but cumulatively serious enough that the eagle is still an endangered species in 43 States.

That is the context in which I would like to discuss the issue that concerns this committee this morning. There has been some confusion at times at this hearing, I believe, about two separate matters. One is Indian treaty rights and the other is Indian religious rights. It is important to keep those two things distinct because they are two separate categories of rights, only one of which did the *Dion* case deal with definitively.

The *Dion* case dealt definitively only with the question of Indian treaty rights and held that, in the eighth circuit, it is permissible

for an Indian with a treaty right to hunt, or presumably fish, to do so notwithstanding the prohibitions of the Endangered Species Act against taking endangered species, so long as that Indian is exercising the right conferred by the treaty.

Now, the nature of treaty rights has got to be considered. Very few treaties specify what species may be hunted under that treaty right. It is typical in almost all instances for the treaty, if it says anything at all about hunting—and when it does not, they have typically been held to imply a right to hunt or fish—it just addresses the subject in very general terms.

The leading authority on Indian law, Felix Cohen, has written that since it was common for Indians to exploit all types of resources available to them, treaties have been customarily interpreted to allow Indians to hunt and fish for all resources now available.

Thus, although the *Dion* case dealt solely with bald eagles, we must realize that its holding extends to any endangered species that any Indian who is a beneficiary of a treaty right may wish to take.

Likewise, Indian treaty rights are not limited geographically to the confines of Indian reservations. Many treaties reserve rights to hunt or fish on lands outside the reservation that have been ceded to the United States in those treaties. Indeed, a few treaties even reserve rights to hunt or fish on lands beyond the lands that were ceded to the United States.

I think I agree with the Interior Department's testimony this morning that the *Dion* case was probably wrongly decided; the Endangered Species Act is indeed the sort of conservation measure that the Supreme Court treats as an implicit qualification upon Indian treaty rights.

Indeed, in his 1973 Puyallup decision in the Supreme Court, the late Justice Douglas wrote that Indian treaty rights:

Can be controlled by the need to conserve a species, and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The policepower of a State is adequate to prevent the steelhead from following the fate of the passenger pigeon, and the treaty does not give the Indians a Federal right to pursue the last living steelhead until it enters their nets.

That, I think, is clearly the basis for my belief, and the Interior Department's belief, that laws and regulations that have as their purpose the conservation of the resource are an implicit qualification upon Indian treaty rights, and no formal abrogation of treaty rights is necessary in order to subject Indians under those rights to such laws and regulations.

I therefore believe that if the Supreme Court has an opportunity to review this case—and I hope that it will—and unless it is prepared to abandon its earlier pronouncements on the scope of Indian treaty rights, there is a very good likelihood that the Supreme Court will overrule the *Dion* case, with the result that there will not be any need for Congress to amend the act so as to increase the protection for endangered species.

Clearly, until we get a ruling from the Supreme Court, at least in the eighth circuit, endangered species there are at risk because of the *Dion* case. But if the Supreme Court overrules that case, I

think that will take care of the concern that has motivated you, Mr. Chairman, and is the motivation for this hearing.

I said at the outset it is important to distinguish treaty rights from religious rights. Religious rights exist independent of treaties and do not depend upon them at all. Neither the *Dion* case nor any other case yet has addressed the question of whether religiously motivated takings of endangered species can be permitted, notwithstanding the prohibitions of the Endangered Species Act.

If such a case does arise in the future, the question will be decided on the basis of the first amendment, because there is nothing in the Endangered Species Act that addresses religious takings in one way or another.

The proposal put forward by the Interior Department was characterized by one of the panelists on the prior panel as representing a potential infringement of Indian religious freedoms. It is that. It is a potential infringement of Indian religious freedoms. It is, at the same time, a potential expansion of Indian religious freedoms beyond what the first amendment provides.

The reason for that is simply because this issue has not yet been tested. There are a great many cases involving Indian and non-Indian religious claims to utilize particular sites or to utilize particular objects or plants and animals in religious ceremonies.

The Supreme Court has not upheld an absolute right to engage in religious conduct. There clearly is a first amendment absolute right of freedom of religious belief. There is not an absolute first amendment right to engage in religious conduct.

For example, under the Controlled Substances Act, the possession of peyote, a natural mushroom with hallucinogenic properties, is prohibited for all citizens. However, a regulation implementing that act allows practitioners of the Native American Church to use it. However, the courts have held that that allowance is not dictated by the first amendment.

So I think it is quite clear that the Interior Department proposal raises difficult questions, questions that the Indians properly perceive may infringe their rights but, from the point of view of conservation, may expand Indian rights to take endangered species beyond what the act now allows.

So I would suggest some caution in dealing with that subject. It seems to me the only subject that this Congress need deal with, if it need deal with any at all, is that which *Dion* deals with, which is the treaty rights, and on that subject, your choices are to wait for the Supreme Court to act or to reaffirm what I think is already clear from the act, that the act was intended to be a conservation measure, with conservation as its only objective, and that the only taking that is permissible of endangered or threatened species under this act is that which is necessary in truly extraordinary cases to relieve population pressures and not any taking that is motivated by any other consideration.

Thank you very much, Mr. Chairman.

[Prepared statement of Mr. Bean follows:]

PREPARED STATEMENT OF MICHAEL J. BEAN, ENVIRONMENTAL DEFENSE FUND

On January 9, 1985, the United States Court of Appeals for the Eighth Circuit, in a case entitled *United States v. Dion*, ruled that the Endangered Species Act's prohi-

bition against the taking of endangered species do not apply to American Indians acting pursuant to a treaty right to hunt. That decision is the catalyst for this hearing, for it has generated considerable interest and emotion about the respective needs of the uniquely valuable traditional cultures of this country and its similarly valuable wild plant and animal resources.

As others here today will doubtless describe in much detail, wild plants and animals play a very important role in many, if not all, Native American cultures. The preservation of those cultures is a vitally important national objective, not merely because cultural diversity is a worthy end in its own right, but also because the United States has, through formal treaties with many Indian nations, special responsibilities that it owes to its Indian citizens.

Ultimately, the twin goals of preserving our rich natural heritage and the traditional cultures of Native Americans ought to be harmonious. For surely there is truth in the observation that cultural practices dependent upon the use of particular wild plants and animals cannot easily be maintained when those species are no longer abundant and readily accessible and will perish altogether if those species become extinct.

Though the *Dion* case dealt only with bald eagles, its holding applies equally to any endangered species that an Indian may take pursuant to a treaty hunting, fishing, or gathering right. According to Felix Cohen, whose treatises on Indian law is the standard authority on the subject, "[i]t was common for Indians to exploit all types of resources available to them. Thus, treaties are interpreted to allow Indians to hunt and fish for all resources now available," unless a species is specifically excluded from a treaty. Very few treaties contain such specific exclusions. Thus, if a treaty right to hunt or fish exists, an Indian holder of that right can kill or collect any species he chooses anywhere that the right exists.

It is important to note that treaty hunting and fishing rights are not limited just to the confines of an Indian reservation. Many treaties also reserve hunting and fishing rights on lands ceded by the Indians; some even reserve such rights on lands beyond those ceded. A partial list of some of the Indian treaties reserving hunting or fishing rights is appended. Even if treaty rights could only be exercised on Indian reservations, a substantial number of species protected by the Endangered Species Act would be at risk. Currently listed species known to occur in Indian lands include not only the bald eagle, but also the California clapper rail, Aleutian Canada goose, peregrine falcon, San Joaquin kit fox, Sonoran pronghorn, whooping crane, gray wolf, Florida panther, American alligator, Everglade kite, eastern indigo snake, wood stork, Indian bat, red-cockaded woodpecker, grizzly bear, and possibly the California condor.

Achieving the goal of ultimate harmony between cultural needs and species survival necessitates restraint by all those with the capacity to diminish the recovery prospects of species already threatened with extinction. That inescapable truth is illustrated quite vividly in the Eighth Judicial Circuit of the United States, where, as a result of the *Dion* decision, Indians with treaty hunting rights may now lawfully kill endangered bald eagles. The six states of North and South Dakota, Nebraska, Iowa, Missouri, and Arkansas, all within the Eighth Circuit, support a winter population of from 2,000 to 3,000 eagles, nearly a quarter of all wintering eagles in the Lower 48 states. Many of those winter at one of the several National Wildlife Refuges that adjoin one or more of the Circuit's 28 Indian reservations. Yet, those eagles are mere transient visitors to those states and to the Indian country within them. All but a handful leave in the spring to breed elsewhere.

Thus, the survival of the bald eagle, and with it the practical survival of Indian treaty eagle hunting rights, cannot be assured by those who hold such rights or even by the states in which they live. Rather, both depend upon coordinated conservation action, including shared restraint. This is hardly a novel proposition, for it reflects Justice Oliver Wendell Holmes' reasoning in upholding the constitutionality of the Migratory Bird Treaty Act some 65 years ago. He concluded that state authority over migratory birds must yield to the exercise of national authority because "[t]he whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another States and in a week a thousand miles away."

These very practical necessities of conservation have not been forgotten by the Supreme Court when it has considered the relationship of Indian treaty rights to governmental authority to regulate hunting and fishing. Thus, even though the Court has consistently and properly interpreted Indian treaties liberally in favor of Indians, it has also consistently maintained that the exercise of treaty hunting and fishing rights may be regulated "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." The

late Justice Douglas articulated this principle in his original *Puyallup* decision, and then amplified upon it five years later in his second *Puyallup* decision with the following:

"[Indian treaty] Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets."

Later in the same year that Justice Douglas wrote those words, the Endangered Species Act was enacted. The bald eagle was designated in 43 states (including all of those mentioned above) an "endangered species", i.e., one that "is in danger of extinction throughout all or a significant portion of its range." The declared purpose of the Act is the conservation of threatened and endangered species by providing them with the very "assurance of survival" of which Justice Douglas wrote, such that they no longer need the protection of the Act. To that end, the Act prohibits the taking of endangered species and authorizes the Secretary to impose such requirements as he deems necessary for the conservation of threatened species, which may include regulated taking only when it is necessary to relieve extraordinary population pressures.

The government's right to regulate Indian treaty hunting and fishing in the interest of conservation is thus clearly established as an implicit qualification on such treaty rights. Moreover, exercise of the government's conservation regulatory authority neither requires nor constitutes an "abrogation" of those treaty rights, even if, as Justice Douglas suggested, it is necessary to ban all hunting or fishing for the benefit of a particular species. Only if the government seeks to restrict treaty hunting or fishing rights for some purpose unrelated to conservation may a formal abrogation of a treaty right be required. The Endangered Species Act, however, clearly has no purpose but conservation and thus is within the scope of permissible governmental regulation of treaty hunting and fishing.

This is the clear lesson of the Supreme Court's consistent line of decisions in this area. The Eighth Circuit's recent *Dion* opinion dodges that result, however, by treating the Supreme Court's reasoning as applicable only to the particular treaties involved in the high Court's earlier cases. If the Supreme Court has an opportunity to review the *Dion* case, I believe it will make clear that its earlier pronouncements were meant to apply generally to all Indian treaty hunting and fishing. If so, the Eighth Circuit's *Dion* decision and the great emotion it has generated will quickly disappear. Thus, it appears both unnecessary and ill-advised to pursue the Eighth Circuit's invitation to consider "abrogating" any Indian treaties. Rather, one need only reaffirm what is already clear from the language of the Endangered Species Act and its legislative history, that its sole purpose is conservation and that to achieve that purpose the prohibition of regulated taking, except in the extraordinary case to population pressure, is necessary.

Having concluded with the treaty rights issues addressed in the *Dion* case, let me turn to an issue not addressed by that case. That concerns the issue of religious rights and the proscriptions of the Endangered Species Act. The *Dion* case dealt only with treaty rights. The extent of any right to take an endangered species for religious purposes, whether by treaty Indians, Indians without treaties, aboriginal Hawaiians and Alaskans, or non-Indians who use wild plants or animals in their religious practices, is simply a matter not yet decided by any court (among non-Indian faiths that use wild animals or plants in their religious ceremonies re certain snake handling Christian sects in the Southeast, the Ethiopian Zion Coptic Church, the Aquarian Brotherhood Church, the Neo-American Church, the Church of the Awakening, the Rastafarians, and American adherents to the Hindu Brahmakrishna sect). Since the Endangered Species Act, unlike the Bald Eagle Protection Act, contains no religious purposes exception from its prohibitions, the scope of any religious right is determined solely by the First Amendment to the Constitution. (The American Indian Religious Freedom Act has been held to require no more than compliance with the First Amendment. See *Crow v. Gullett*, 541 F.Supp. 785, 794 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 413).

The First Amendment extends its protection both to religious belief and to religious conduct. However, whereas the freedom to believe is absolute and may not be abridged, the freedom to engage in religious conduct is not absolute and may be abridged if necessary to serve an overriding state interest. Though no case has yet pitted First Amendment claims against the prohibitions of the Endangered Species Act, the governmental interests served by that Act would appear to be even more compelling than those that have been held to justify limitations on religious conduct

in other cases. It has been suggested that a feature of Chairman Breaux's original proposal, requiring permits to take protected species for religious purposes, was offensive. Such requirements may offend some individuals, but they do not offend the First Amendment. Indeed, a state requirement that Indians participating in a religious ceremony at a sacred site in the state park register to do so and obtain permits was held not to burden their religious rights impermissibly in *Crow v. Gullett*, *supra*, in light of the state's interest in controlling traffic and in providing a means of contacting park visitors in case of emergency.

The limits of the First Amendment's protection of religious conduct, as distinct from religious belief, are evident from many other cases. For example, though implementing regulations under the federal Controlled Substances Act permit members of the Native American Church to possess and distribute the Hallucinogenic mushroom, peyote, that exemption has been held not to be required by the First Amendment, and, indeed, members of non-Indian religions do not have a constitutional right to gather and use this wild plant. See *United States v. Warner*, 595 F.Supp. 595, 599 (D.N.D. 1984). Similarly, the total inundation of sacred Cherokee lands by the waters behind Tellico Dam and the consequent elimination of all access to the flooded sacred sites for religious worship was held not to violate the First Amendment in *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

Like the exemption for Indian use of peyote in the Controlled Substances Act, the exemption for Indian religious and ceremonial uses in the Bald Eagle Protection Act is probably not constitutionally required, though it is a permissible favoring of Indian interests because of the special political responsibilities the United States owes to its Indian citizens. Adding a similar provision to the Endangered Species Act would thus likely expand, not contract, Indian rights to take endangered species in light of the First Amendment principles discussed here. Before taking such a step, however, prudence would dictate first identifying species likely to be taken under such an exception and fashioning compensatory measures to offset the adverse effects of the permitted taking.

APPENDIX

INDIAN HUNTING AND FISHING RIGHTS

Treaties that provide Indians with the right to hunt and fish on their reservations

Treaties may explicitly preserve hunting and fishing rights. However, even where a treaty is silent as to any hunting and fishing rights, the courts have had little difficulty in finding such rights within the reservation. Hence, in *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968), the Court held that even though the 1854 Treaty of Wolf River did not specifically mention hunting and fishing rights, the language "to be held as Indian lands are held" reserved the rights to fish and hunt. See also, *State v. Johnson*, 249 N.W. 284, 288 (1933), and *State v. Sapinaw*, 124 N.W. 2d 41 (1963). Moreover, where the treaty provides explicitly for the right to fish but not hunt, the courts have found such treaty fishing rights include hunting rights. See, *Kimball v. Callahan*, 493 F.2d 564, 566, *cert. denied*, 419 U.S. 1019 (1974) and *State v. Tinto*, 94 Idaho 759, 497 P.2d 1386 (1972).

Treaty with the Yakamas, 1855

Treaty with the Klamaths, Moadocs, and Yahooskin Band of Snakes, 1864 (see, *U.S. v. Adair*, 723 F.2d 1394 (1983))

Treaty with the Flatheads, Kootenays and Upper Pend d'Oreilles, 1855

Treaty with the Walla-Wallas, Cayuses, and Umatillas, 1855

Fort Laramie Treaties of 1851 and 1868 with the Lower Brule Sioux Tribe (see, *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (1983))

Hellgate Treaty with the Confederated Salish and Kootenai Tribes (see, *U.S. v. Pollman*, 364 F. Supp. 995 (1973))

Treaty with the Crow Indians, 1868 (see, *U.S. v. Finch*, 395 F. Supp. 205 (1975))

Treaty with the Chippewa Indians, 1837, (see, *U.S. v. Winans*, 198 U.S. 371, (1905), and *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (1971))

Treaty of Wolf River, 1854 (see, *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968))

Treaty with the Choctaw Indians, 1786

Treaty with the Shawnee Indians, 1786

Treaty with the Wyandot Indians, 1789

Treaty with the Osage Indians, 1795

Treaty with the Comanche Indians, 1835

Treaty with the Yankton Sioux, 1858 (see, *Dion v. U.S.*, — F.2d — (1985))

Treaty of Point Elliot with the Tulalip Indians, 1859 (see, *U.S. v. Fryberg*, 622 F.2d 1010 (1980))

Treaties that provide Indians with "the right of taking fish, [off the reservation] at all usual and accustomed grounds and stations, . . ."

Indians cannot be barred from their usual and accustomed fishing places, (*U.S. v. Winans*, 198 U.S. 371 (1905)), and such usual and accustomed fishing places may be either on or beyond the territory ceded by that tribe in its treaty with the United States. (*Seufert Bros. Co. v. United States ex rel. Confederated Tribes of Yakima Indian Nation*, 249 U.S. 194, 198-199 (1919)).

Treaty with the Nisquallys, 1854

Treaty with the Puyallups, 1854

Treaty with the Steilacooms, 1854

Treaty with the Squawksins, 1854

Treaty with the S'Homamish, 1854

Treaty with the Steh-chass, 1854

Treaty with the T'Peeksins, 1854

Treaty with the Squi-atils, 1854

Treaty with the Sa-heh-wamish, 1854

Treaty with the Dwamish, Suquamish and other Indians, 1855

Treaty with the S'Klallams, 1855

Treaty with Makak, 1855

Treaty with the Walla-Wallas, Cayuses, and Umatillas, 1855

Treaty with the Yakima Indians, 1855 (see, *Sohappy v. Smith*, 302 F. Supp. 899, 529 F.2d 570 (1976), right to take fish at all usual and accustomed places on the Columbia River and its tributaries; see also, *U.S. v. Oregon*, 657 F.2d 1009 (1981), Yakima Tribe right to fish Columbia river.

Treaty with Chippewa Indians of 1836 and 1855, see *U.S. v. Michigan*, 623 F.2d 448 and 653 F.2d 277 (1981), Chippewa Indian's right to fish, including gill net fishing, in waters of Lake Michigan off reservation.

Treaty with the Nez Perce Indians, 1855 (see, *Sohappy v. Smith*, 302 F. Supp. 899, 529 F.2d 570 (1976), right to take fish at all usual and accustomed places on the Columbia River and its tributaries.

Treaty with the Tribes of Indians of Middle Oregon, 1855

Treaty with the Quinault and Quilehute Indians, 1855 (see, *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (1981) Quinault and Quillehute right to fish Columbia River; see also, *U.S. v. Washington*, 384 F. Supp. 312 (1974), 520 F.2d 676 (1975), 459 F. Supp. 1020, 573 F.2d 1123, substantially affirmed sub nom. 443 U.S. 658 (1979). Hoh Indian Tribe, Quilehute Tribe of the Quileute Reservation, and the Quinault Indian Nation each hold separate fishing rights to take salmon and other fish at their respective usual and accustomed fishing places on and off their respective reservations.

Treaty with the Flatheads, Kootenays and Upper Pend d'Oreilles, 1855

Treaties that provide for cession of all but a reservation, but reserved to the Indians "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . ."

Treaty with the Crow Indians, 1868

Treaty with the Shoshone and Bannock Indians, 1868 (see, *U.S. v. Top Sky*, 547 F.2d 486 (1976))

Treaty with the Northern Cheyenne and Northern Arapahoe Indians, 1868

Treaty with the Cheyenne and Arapahoe Indians, 1867

Treaty with the Walla-Wallas of 1855, (see, *Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013 (1967), Confederated Tribes of Umatilla Indians have right to hunt for subsistence purposes on unclaimed lands. (Here, elk and deer on national forest lands)

Treaties that reserve rights to hunt and fish on ceded lands:

Treaty between the U.S. and the Klamath and Moadoc Tribes and the Yahooskin Band of Snake Indians of 1864 (see, *Klamath Indian Tribe v. Oregon Dept. of Fish and Wildlife*, 729 F.2d 609 (1984), upholding right to hunt and fish on ceded lands)

Treaty with the Chippewa Indians of 1837 and 1842 (see, *Lac Courte Oreilles Band v. Voight*, 700 F.2d 341 (1983) and *U.S. v. White*, 508 F.2d 453 (1974))

Treaty with the Menominee Indians, 1854 (see, *State v. Sapinaw*, 21 Wis. 2d 377, 383, 124 N.W. 2d 41, 44 (1963))

Treaty of Fort Laramie, 1851 (see, *U.S. v. Dion*, — F.2d — (1985), tribes of Sioux Nation)

Treaties that reserved rights to take particular species of special importance to the Indians

Treaty with the Makahs, 1855 (seals and whales)

Treaties that expressly guarantee rights to hunt and fish outside a reservation

Treaty with the Seneca Indians, 1797

Treaty with the Cherokee Indians, 1798

Treaty with the Kaskaskia Indians, 1803

Treaty with the Sac and Fox Indians, 1804

Treaty with the Wyandot, Ottawa, Chippewa, Munsee and Delaware, Shawnee, and Pottawatima Indians, 1805

Treaty with the Osage Indians, 1808

Treaty with the Chippewa, Ottawa, Pottawatamie Wyandot, and Shawanoese Indians, 1808

Treaty with the Ottawa, Chippewa, and Pottawatamie Indians, 1816

Treaty with the Quapaw Indians, 1818

Treaty with the Pottawatamie Indians, 1832

Agreements and Statutes that provide Indians with rights to hunt and fish

Following an 1871 statute that prohibited further treaties with Indian tribes, the usual method of dealing with Indian tribes and establishing reservations was either by statute, executive order, or agreement later approved by statute.

1891 Agreement between the Confederated Tribes of the Colville Indian Reservation, including the Colville, Columbia, San Poil, Okanogan, Nez Perce, Lake, Spokane, and Coeur d'Alene, and the United States reserving hunting rights. (See, *Antoine v. Washington*, 420 U.S. 194 (1975))

1892 Klamath River Reservation Act of 1892 preserved rights of Klamath Indians to hunt, trap and fish in "Indian Country." (See, *Mattz v. Arnett*, 412 U.S. 481 (1973))

1891 Statute (25 U.S.C. Sec. 495) setting aside the Annette Islands as a reservation for the Metakatla Indians reserved adjacent waters for fishing. (See, *Alaska Pacific Fisheries*, 248 U.S. 78 (1918))

Mr. BREAU. Thank you.

I have a recorded vote. Let me go get that, and then I will come back and we will take Paul Lenzini's testimony.

[Recess.]

Mr. BREAU. The subcommittee will please be in order.

We will take the testimony of Mr. Lenzini.

STATEMENT OF PAUL LENZINI, LEGAL COUNSEL, INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES; ON BEHALF OF WESLEY F. HAYDEN, LEGISLATIVE COUNSEL

Mr. LENZINI. Thank you, Mr. Chairman.

I will summarize the testimony of the International Association of Fish and Wildlife Agencies, an organization whose Government members are the 50 State wildlife agencies.

The *Dion* case, under discussion, did not say that Congress could not regulate in this area or that it should not regulate in this area, but that it had not regulated in fact in this area.

We think that decision is wrong. We think that the surrounding circumstances of the statute and its history indicate the Congress did so intend. But, nonetheless, we are here today to discuss the impact of it. We think it has grave impact and are quite concerned about it and hope that somehow it can be overturned, either in the Supreme Court or by the Congress.

We think a weakness or a problem in respect of the amendment drafted by the Department of the Interior at the subcommittee's request is that it would appear to set up categories or subdivisions of endangerment; thus, endangered species which were really, truly endangered would not be the subject of permits, and I gather those

which are less endangered would be the subject of permits. And so it is a question, I guess, of imminent extinction: Is extinction ready to take place?

In the case of the Florida panther, we have an example where the chief of the Seminole Tribe has been arrested under a Florida statute for having taken a Florida panther a year or so ago. One numbers the Florida panthers in the dozens. There may be 30, give or take 10, Florida panthers left. It is the most endangered large mammal in North America.

In consequence of that, we would be quite concerned if a permit procedure were available under which somehow that type of species could be taken, and therefore, we are concerned about the notion that there are degrees of endangerment.

Nonetheless, if this committee in its wisdom believes that such a permit procedure should be undertaken, we would draw the committee's attention to an existing provision in section 6[g] of the Endangered Species Act, a provision which is very dear to the States, and that says that with respect to the taking of any endangered species, any exemption or permit which is provided for in the statute cannot be—the State can be more restrictive, and therefore the permit or the exemption cannot avoid a State veto.

We therefore have a situation of joint permitting, and we would hope that that would continue if there were a provision setup under which permits were made available for religious purposes. In the case of the Florida panther, for example, we do not see how the State could permit a permit to be granted in a situation like that.

We also would remind the committee that section 6 produces a very tight fit between State programs and Federal programs. The State programs are really part of a single governmental mechanism to get at the problem of endangerment, and therefore in the circumstances, if there are to be permits or exemptions provided, we hope that the State interest, as has been shown in the Florida situation, will be borne in mind.

In answer to some of the committee's questions, we heard the answer given that it is simply not permissible for the Federal Government to abrogate treaty rights. We do not see this as abrogation. It is simply the regulation of treaty rights, if in fact there is a treaty right at all, to follow the last trout into the net. So we think that the mere fact that there could be an abrogation does not meet the point. We think it is not an abrogation.

With respect to first amendment religious rights, these rights are not absolute. If there is a compelling State interest, and if the least restrictive method is used, we think that that is permissible regulation.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Hayden submitted by Mr. Lenzini follows:]

PREPARED STATEMENT OF WESLEY F. HAYDEN, LEGISLATIVE COUNSEL, INTERNATIONAL ASSOCIATION OF FISH & WILDLIFE AGENCIES

Mr. Chairman: It is always a pleasure to come before this subcommittee on behalf of the International Association of Fish and Wildlife Agencies to share with you the organization's view on matters of mutual interest and concern.

And that certainly applies in the matter you will be considering this morning.

There is already abundant evidence in your subcommittee's records of the Association's consistently strong support of the Endangered Species Act and its underlying objectives since the inception of the Act, so it needs no embellishment at this point.

I allude to it now only to underscore our complete understanding of, and full concurrence in, your perception of the grave consequences that could result from the Eighth Circuit Court of Appeals decision in the Dion case, if it is allowed to stand.

We find the potential for such damage to be clear and threatening in the language of the Court's ruling that the taking prohibitions of the Endangered Species Act are not applicable to Indians for acts committed on tribal reservations.

Its reasoning in overturning convictions of tribal members for killing of bald eagles was that, while Congress prohibited taking by "any person subject to the jurisdiction of the United States", it did not make express reference to Indians and thus did not abrogate hunting rights under the Yankton Sioux treaty (which treaty, incidentally, is silent on hunting rights).

Put in the simplest terms, the effect of the ruling was to say that reserved Indian hunting rights take precedence over any limitation imposed by the Endangered Species Act.

In our view, that is a misinterpretation of congressional intent and of the high purposes of the Act concerned, and one which calls into question the integrity of both federal and state endangered species efforts.

In that vein we find it significant that the Eighth Circuit ruling ran counter to an earlier finding on a similar issue by the Ninth Circuit Court of Appeals in *United States v. Fryberg*, a 1980 case, as well as to the dissenting views of three of its own judges sitting on the Dion panel.

We find equally disturbing in the Eighth Circuit ruling its potential, if not successfully challenged, for becoming a precedent for reference in future cases bearing on the same general issue.

And that would have additional far-reaching and serious consequences for the whole endangered species initiative and for the well-being of other species than eagles on the protected list. Each of them could literally become fair game in any tribal reservation or treaty area.

One such case is already looming on the near horizon, that of a Seminole chief accused of killing a Florida panther on the tribe's reservation in Hendry County. He is now scheduled for trial in state court on June 25 and federal charges, while not yet filed, are also being considered. The panther, whose population in Florida is estimated by state fish and game officials as "in the dozens", is described as one of the most endangered large animals in the world.

What other endangered birds, or animals, could be next, or where the threat might surface in the absence of remedial measures, is a matter of conjecture.

But in our judgement there is already a clear and demonstrated need for such action to erase the questions and uncertainties created by the Eighth Circuit ruling.

In our considered judgment, the most appropriate course for such action under present circumstances is by amendment of the Endangered Species Act during its ongoing reauthorization process.

That would have the dual advantage of a relatively short time requirement and of an opportunity for spelling out a clear restatement of Congressional intent on the objectives and limitations of the endangered species program.

Without attempting to suggest the precise language for such an amendment, we submit that it should provide in a way not subject to any doubt that Indian treaty rights respecting fish and wildlife be subject to non-discriminatory state laws and regulations as they relate to endangered and threatened species listed by the Secretary of the Interior and to non-discriminatory state laws and regulations relating in the same degree as to federal laws.

We would, as an organization, support such an amendment and work in any appropriate way with your subcommittee and staff for its adoption as a part of the reauthorized Endangered Species Act. Thank you for allowing us to present these comments.

Mr. BREAU. I take it, Mr. Bean, that what you are recommending is that the committee not take any legislative action until the Supreme Court is allowed to rule?

Mr. BEAN. I think that should be very seriously considered by the committee. Obviously, this is an issue that has aroused great emotion and interest, and it would not appear likely that we will get any kind of consensus on it.

Clearly, if you get a Supreme Court resolution of this issue that reverses *Dion*, the effect of that may be preferable to legislation. Congress will not have to "take" away rights from anyone. The Supreme Court does not take away rights or grant rights; it interprets what rights exist. So if we get a definitive Supreme Court ruling on this—

Mr. BREAUX. That is only a textbook opinion of what the Supreme Court does, right? [Laughter.]

Mr. BEAN. That is right, but it is the textbook I used.

So it seems to me, in some ways, the resolution of this by the Supreme Court has a greater chance of being accepted as appropriate and proper, whereas, in the absence of consensus, in the legislative process there must be winners and losers, and losers find it hard to accept their loss. It may not be necessary to have winners and losers of that sort if the Supreme Court gets a chance to review this case.

Mr. BREAUX. Is it your opinion that the amendment that was proposed by Interior this morning would expand the rights of Native American Indians with regard to the taking of endangered species in areas outside the eighth Circuit *Dion* case?

Mr. BEAN. With respect to religious taking, it has that potential because, as I say, the limits of what type of religious conduct is protected by the first amendment have not been settled in this area at all. It may well be that the act right now would be interpreted as barring any taking of an endangered species for any claimed religious purpose. Thus, the amendment, by allowing some taking so long as it does not result in jeopardy, would be an expansion of what the first amendment now would give to the Indians.

Mr. BREAUX. Would your organization have any opinion on the suggested amendment by Interior at this time?

Mr. BEAN. Well, our suggestion is that you limit yourself, if you choose to do anything at all, to addressing the treaty rights question alone, and that you not address the religious taking issue.

But on treaty rights, our position is clear that we think the *Dion* case is wrongly decided, and you ought either to let the Supreme Court have the say on that or, if you wish, just reaffirm the fact that the sole purpose of this act is conservation, and it is meant to apply to all citizens, and its restrictions on taking are meant to be every bit as restrictive as the definition of conservation in the act says.

Mr. BREAUX. Mr. Lenzini or Michael, I guess I asked this question indirectly to the previous panel—but are there in effect any conservation measures that you are aware of from your experience with regard to the taking of endangered species, the bald eagle, that are in force by American Indian tribes?

Mr. LENZINI. I am not specifically aware, but I would be surprised if there were not, Mr. Chairman. There are tribal codes, and I suspect that there are regulations. The fact of the matter is, though, that these are not necessarily mandatory under Federal or State law. But I do understand that tribal codes exist.

Mr. BREAUX. Well, the problem we have is, do we move forward with an amendment or do we wait for the Supreme Court to rule on this thing? I just want to try to accomplish something that will restrict the taking of an endangered species for any purpose.

I just do not understand why any group or organization would have the right to take a species that is truly endangered, if it is in that status, for whatever purpose, whether it is for commercial purposes or whether it is just for the pleasure of hunting, or whether it is because of some religious belief.

There were many religious beliefs in other societies and in this country that are not allowed today because they are not in the interests of society in general. Polygamy was a religious practice that is not legal in this country today. There were many others, but there are legitimate restrictions on the exercise of one's religious beliefs if in fact it is not in keeping with the overall good of society.

I appreciate your help and your testimony. Hopefully, we will be able to come up with something that is appropriate.

Paul, do you have any difference with Mr. Bean with regard to the likelihood of a Supreme Court decision?

Mr. LENZINI. I agree with Mr. Bean, Mr. Chairman. I think that if in fact the Supreme Court is asked to take it, they may well take it, and if in fact they take it, they may well reverse, because I think there is a very substantial argument to be made on the other side of this.

The question is, will they be asked to take it? We will know that, I gather, by about the 20th of July.

Mr. BREAU. Is there any provision of the Endangered Species Act that currently exists that would allow for some sort of a religious-exemption taking?

Mr. LENZINI. The section 10-permit provision is limited to scientific purposes and propagation. It does not include this authority, as I understand it.

Mr. BREAU. Do you agree with that?

Mr. BEAN. Yes, I agree with that. I suppose it may be possible to fashion some argument to the effect that taking these species is incidental to the practice of religion, and thereby taking could be permitted as an incidental taking. That seems a bit strange. If it were the case, you would have to come up with a conservation plan that would compensate for the adverse effects of that. But I think that is an unlikely interpretation. There clearly is nothing in the act that expressly addresses it.

Mr. BREAU. Well, the point I was trying to make is that I am willing to go that extra route and to expand the Endangered Species Act for the purposes of religious beliefs, as long as there is some permit or some kind of restriction on that taking. I don't like it, for any reason, but the bowhead whale is an endangered species, scientists tell us—we can disagree on that or not—but that is a determination that is legally in effect. There is a limited taking. I think the number is 18, and they cannot take any more than that.

But we allow them, because of religious beliefs, to take 18 which should not be taken except for the religious belief that is prevalent and predominant among Alaska Natives.

If we establish that with regard to the American bald eagle and the Endangered Species Act in general, I am willing to go along with that. The Interior Department, which is in charge of the Endangered Species Act, is going to have to work out an acceptable number for religious purposes.

Mr. BEAN. Mr. Chairman, if I may add a remark to that, the Bald Eagle Protection Act, since 1962, has had an Indian religious purposes exception to it.

In the eighth Circuit, the court has interpreted that in a rather curious way to say that notwithstanding that special exception for religious purposes, Indians also have rights under treaties to take bald eagles. In other words, the eighth Circuit did not view that narrow exception for religious purposes as limiting the pre-existing treaty rights.

I just want to bring that to your attention. It is necessary to address both if you intend to address the latter.

Mr. LENZINI. Yes.

Mr. BREAU. We will. I have honestly not decided as to whether to just let the Supreme Court rule or whether we should take action now. I believe, as you do, that if the Supreme Court takes the case, the rights of Indians to take an endangered species, namely the bald eagle, are going to be severely restricted. I think that they will be prohibited from taking any. My amendment would set the stage for allowing them to take a certain predetermined number for religious purposes.

I appreciate your testimony and the testimony of all the previous witnesses. The committee will now study the testimony and then make a decision certainly July 20, which is the date I think the Supreme Court is supposed to decide whether they would take the case or not.

Mr. LENZINI. They have to be asked by the 20th, I think.

Mr. BREAU. We would not make a decision prior to that time as to which way we are going to go.

With that, the subcommittee will stand adjourned until further notice.

[Whereupon, at 12:40 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

[The following was received for the record:]

PREPARED STATEMENT OF REPRESENTATIVES OF THE INTERRELIGIOUS FAITH COMMUNITY

As representatives of the interreligious faith community, we would like to state our views on the proposed amendment by Congressman John Breau of Louisiana to H.R. 1027, the reauthorization of the "Endangered Species Act." This bill has been reported out of full committee and is awaiting floor action.

Particularly, we would like to address that part of the proposed amendment which, as we understand it, would prohibit the taking of endangered species by Native Americans except for religious purposes. It would require that a permit be issued by the Secretary of the Interior for such a taking, but only if "the specimens required for the religious purpose cannot be provided from existing inventories of specimens or parts of the specimens that are owned by the United States . . ."

Many of our organizations support a national policy of conservation which reflects our belief that we are to honor the earth. Furthermore, we agree with the compelling reason behind this language, which seeks to prevent the extinction of threatened and endangered species.

However, it is our view that the language of the proposed amendment presents members of Congress with the necessity of choosing between two important goals: religious freedom and the protection of endangered and threatened species. We believe that freedom of religion is an inherent right of all peoples. The inherent and constitutionally-secured right of Indian people to exercise freely their traditional native religions supersedes the legislative protection of Public Law 93-205, the "Endangered Species Act." The U.S. Constitution provides for the protection of all religions against federal regulation. In addition, the "American Indian Religious Free-

dom Act of 1978" states that: "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the[ir] traditional religions . . . including but not limited to . . . use and possession of sacred objects."

As members of the religious community above all, we must express our concern for religious freedom by opposing regulatory restrictions on the practice of Native American religions. While we believe that the required permit system is not inherently bad, the goal of preservation of species should be implemented in the manner which least interferes with native religious practices.

It may be difficult for non-Indians to appreciate the use of sacred objects in Indian religions. But perhaps it is helpful to compare the use of eagle feathers, wild rice or sage with the symbols which are so full of meaning and integral to non-Indian religious traditions: the Star of David, the bread and wine, sacred books. Prohibiting the taking of or requiring a permit for the taking of birds, animals, fish or plants for use in worship by Native Americans is similar to requiring a Christian to obtain a permit to enter a house of worship or a Jew to pray. We believe that unless it can be proven that Indian use of endangered species has precipitated a crisis which must be addressed immediately, such a regulatory requirement would be an unnecessary impediment to native religious practices.

A second concern with this amendment is that Indian leaders and those who practice traditional native religions were not consulted. Because we support the right of Indian people to direct their own lives and determine the course of their own nations, we must express our great concern about enacting legislative provisions which will affect Native American people without including their participation and consultation. Any federal policy or procedure which will certainly affect and may alter the conduct of native religious practices must be undertaken "in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve" native religions ("American Indian Religious Freedom Act").

We urge that the Breaux amendment not be offered to H.R. 1027 until adequate discussion may take place with Indian people, and until language can be written which both is acceptable to them and which would serve to protect and enhance their right to observe their traditional religions.

Lastly, a number of unanswered questions surround this amendment, questions we believe should be addressed before any deliberate action is taken:

What factual basis has been laid to justify making the important decision to enact this provision?

What and how many endangered species are used in traditional native religions, and by what tribes?

What would be the affect on different tribes which view this issue in different ways?

What is the dividing line between use of endangered species "for religious purposes" and other uses which are decorative, economic, cultural?

What assurance is there that those who practice traditional Indian religions will have adequate information about the "existing inventories" and the location of repositories to which they must apply for specimens?

Would those repositories be able to respond to such requests for specimens promptly and be able to meet the need?

What are the conditions under which a permit would be granted or denied to an Indian person?

Have the Bureau of Indian Affairs or congressional committees with jurisdiction in Indian affairs been consulted about which tribes' treaty rights, in addition to religious freedom rights, might be violated? (We understand that none were invited to comment on this provision.)

What tribal regulations, prohibiting the killing of endangered species, may already be in place?

It is our feeling that until these questions are answered, the Subcommittee would be well advised to keep its attention focused on poaching and other violations which cause the decline of species, and instead write an exemption for native people who use endangered species in "their inherent right of freedom to believe and express and exercise the[ir] traditional religions."

We thank the Subcommittee and especially Chairman Breaux for holding a hearing on this amendment to H.R. 1027 on June 11. Because of the seriousness of the religious freedom right which is the subject of the amendment in question, we strongly encourage Congress to be careful and deliberate in deciding what, if any, action should be taken. A number of species are integral to the religious traditions and cultures of many Indian people, species which tribes are most eager to protect

and preserve. Surely the worship of native people in their religious ceremonies, celebrated for millenia, have not caused wildlife to be threatened. We do not believe that the treaty rights and religious freedom rights of native people should be limited because of the regrettable actions of those who have had less respect for the earth.

The sanctity of life is central to all our religious traditions, as is thanksgiving for and the celebration of the many gifts of creation. Native Americans remind us of a spiritual understanding which is central to our faiths but which the western world all too often overlooks: that we as human beings have a personal relationship with all of creation, and are members of one family, created out of joy "in the beginning." We encourage discussion with native people about endangered species and their religious freedom and are hopeful that legislative language may be reached in due time which brings about the goal, in the words of Lakota prayer, "That the people"—all creation, all the circle of life—"may live." Thank you for your consideration of our views.

PREPARED STATEMENT OF THE NAVAJO NATION

Mr. Chairman and members of the subcommittee, the Navajo Nation is pleased to present written comments regarding the Proposed Amendments to the Endangered Species Act.

We are fully aware of the circumstances that prompted Congressman Breaux (LA) to propose these amendments. With this in mind, we now state the position of the Navajo Nation as it relates to this issue.

The Navajo People, like other Indian people nationwide, are a traditional and cultural people and have a deep and sincere respect for the natural environment. This includes the plants and wild animals. Our traditional people utilize many of these plants and animals, and they are very important to the Navajo way of life. Certain plant parts are used as medicine while other parts are used to dye the wool that is spun into our beautiful, world-famous traditional Navajo rugs. Navajo medicinemen and other traditional Navajos also utilize feathers, pelts, and other parts of many kinds of birds and animals in the practice of the Navajo traditional religion.

Included in these ceremonies are special prayers of thanks to Mother Earth, who has provided us with these plants and wild animals that are so important to maintaining our Navajo tradition. We also pray that these things of nature will always be plentiful and available for our continued use. Thus, it is our intent to preserve the important plants and animals that are so vital to maintaining our Navajo culture.

It is because of this concern that the Navajo Nation became the first Indian tribe to enact legislation to protect our native threatened and endangered species. In November 1977, the Navajo Tribal Council passed a comprehensive Navajo Endangered Species Act (17 N.T.C. Sec. 507) a measure providing for both direct and interagency protection of all species listed as "Endangered" on the Navajo Reservation, including federally listed species. Likewise, in November 1977, the Navajo Tribal Council passed legislation to protect bald and golden eagles. The Navajo Bald and Golden Eagle Act (17 N.T.C. Sec. 505) protects against unlawful taking or possession of bald or golden eagles. To further demonstrate our sincerity and advocacy of sound wildlife management, the Navajo Nation, in 1977, became the first Indian tribe to establish a system to regulate the taking and export of bobcats in compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora and in cooperation with the Office of Scientific Authority, U.S. Fish and Wildlife Service.

Not only does the Navajo Nation afford protection for these unique species, but we also have established legislation and enacted codes and regulations to protect all fish and wildlife resources on the Navajo Reservation. The fact is, the taking of any fish and wildlife on lands or waters under the jurisdiction of the Navajo Nation is strictly regulated.

As you can see, the Navajo Nation is truly concerned about the prudent use and management of all wildlife resources. To that end, we have established a tribal fish and wildlife program that deals with all aspects of fish and wildlife management. The Navajo Nation has made an honest effort to effectively manage our fish and wildlife resources without the assistance of any federal funds that are appropriated for fisheries and wildlife projects, but unfortunately, are not made available for use by tribal programs.

The Navajo Nation is fully aware of the provisions of the American Indian Religious Freedom Act of 1978 and acknowledges the importance of this Act to Native

Americans. We will continue to fight for and support any laws or treaties that guarantee our rights as Native Americans, particularly as it relates to maintaining our Navajo culture.

However, we cannot and will not advocate the misuse, by any Indian tribe, of rights that provide Indian people special privileges. In exercising, not only our hunting and fishing rights, but also the right to manage our own affairs as true sovereign nations, we must also exercise a true sense of responsibility.

The circumstances that led up to the *United States v. Dion* case are a poor example of Indians exercising their hunting and fishing rights in a responsible manner. Although we agree that Indians should be given the opportunity to take protected species strictly for religious purposes, we also agree that any taking should be regulated and be allowed only if such taking is not likely to jeopardize the continued existence of such species.

If amendments to the Endangered Species Act are passed to include all "persons," including Indians, within the provisions of the Endangered Species Act, then we feel that it would be appropriate to amend all portions of the Act that makes reference to "States and other agencies" to include Indian tribes. Further, we believe that adequate provision should be made under Section 10 to allow Indians to take protected species provided the taking is not likely to jeopardize the continued existence of such species. Likewise, the Navajo Nation recommends that Indian tribes, such as ours, who have enacted legislation and have established codes, rules and regulations to protect endangered species, be included in section 6. In doing so, Indian tribes would be provided the same opportunity that is currently provided to states and territories of the United States to enable them to establish and maintain adequate and active programs for the conservation of endangered and threatened species, consistent with the purposes and policies of the Endangered Species Act.

We believe this direct involvement with Section 6 would allow Indian tribes the opportunity to determine the status of threatened and endangered species on lands within their jurisdiction and allow them to establish and maintain programs for the conservation of these species. We further believe that this direct involvement would provide Indian tribes the mechanism to clearly establish whether any taking of protected species is justified and does not jeopardize the continued existence of the species.

In conclusion, the Navajo Nation is committed to protecting the Navajo way of life and opposes any laws that would take away our basic rights to exist as Navajo People. The Navajo Nation also firmly believes that in order for us to continue to practice our traditions which require the use of endangered or threatened species, we must also afford those species the protection that is necessary to maintain their existence. The Navajo People surely do not want to be responsible for taking the last golden eagle. To do so would destroy our own beliefs. We definitely would not want to practice our traditions to the point of extinction. To have no concern for the conservation of traditionally important species would lead us to that point of extinction. This is not the Navajo way.

The Navajo Nation stands ready to assist the subcommittee in establishing a workable plan that is considerate of the needs and concerns of the Indian people while at the same time is consistent with the intent of the Endangered Species Act. The Native American Church of Navajoland, Inc., also submits the attached comments for your consideration.

The Navajo Nation appreciates the opportunity to provide written comments and thanks the subcommittee for their consideration.

STATEMENT OF EAGLE FEATHERS BY JAMES TOMCHEE, PRESIDENT, NATIVE AMERICAN CHURCH OF NAVAJOLAND, INC.

The proposed changes to the Federal Endangered Species Act that would prohibit Indians from hunting bald or golden eagles or to use their parts for traditional religious purposes are of great concern to the members and officials of the Native American Church of Navajoland, Inc.

The present federal laws may need to be changed to prohibit Indians who hunt eagles for the purpose of selling them to the Indian religious leaders but to ban the use of feathers and parts of eagles would ultimately destroy the Indian culture.

We, the members of Native American Church of Navajoland, Inc., have instituted an Internal Control System to assure that peyote and feathers, including eagle feathers, are used for a bona fide religious purpose. The system involves certifying members and roadmen and maintaining master lists of who they are. Members are instructed through periodic seminars to comply with federal, state and tribal laws

in obtaining both peyote and the feathers of eagles and other protected birds. We contend that the use of such items as peyote and eagle feathers and feathers and their parts of other birds is necessary to the survival and preservation of Navajo religion and culture. We further contend that NAC peyote religion which uses eagle feathers and parts in rituals, is an integral part of Navajo culture, and is protected by Public Laws 95-341, 92 Stat. 469, "The American Indian Religious Freedom Act."

The legislative history of the American Indian Religious Freedom Act is clear in finding that religion is an integral part of Indian culture. The Congress has the power or duty to preserve our Native American Indians as a cohesive culture. The exercise of this power and duty is not owed to Indians as a legalistic tribe but as people who have a distinctive culture. Congress, in the American Indian Religious Freedom Act, has recognized this duty.

To ban the use of eagle feathers and their parts is in essence to ban our Navajo culture. Such incompassionate endeavors by the Congress would be a direct violation of its own law. NAC recommends that if changes are to be made in the law, Congress should consider granting exemptions to NAC members who comply with a workable internal control policy to use and possess eagle feathers and their parts for a bona fide religious ceremony.

Therefore, once again, we call upon all liberty loving people for tolerance, and that we declare our inalienable rights to protection in the free exercise of our religious beliefs and in the unmolested practice of the ritual thereof.

For further information, you may contact Mr. James Tomchee, President, Native American Church of Navajoland, Inc., at (602) 656-3423 or write to P.O. Box 2898, Shiprock, New Mexico 87420.

ESTABLISHED BY THE
TREATY OF JUNE 9, 1855
CENTENNIAL JUNE 9, 1955

CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

POST OFFICE BOX 151
TOPPENISH, WASHINGTON 99048

GENERAL COUNCIL
TRIBAL COUNCIL

June 11, 1985

The Honorable John Breaux, Chairman
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
544 House Office Building Annex II
Washington, D.C. 20515

Dear Congressman Breaux:

The Yakima Indian Nation is quite concerned over what we understand may be attempts to amend the Endangered Species Act in a manner that could prohibit or infringe on our religious practices where such practice involves certain species of fish, wildlife or plants.

We understand that the impetus for the Committee's consideration of such amendments, in great part, stems from a recent case in South Dakota involving the taking of eagles by some Indian people. While we are not familiar with the particular facts in the South Dakota case and can not therefore comment on it, we caution against any over reaction to that unique case by attempting to implement an across the board solution applicable to all tribes. At Yakima we have incorporated into our own tribal fish and wildlife code, a total prohibition against any tribal member killing an eagle on our reservation and will prosecute anybody who kills one.

An important species of wildlife to our people is the salmon and steelhead which we use as a very significant part of our ceremonial and religious practices. The importance of these fish to the Yakima people is evidenced by the fact that even in years where we voluntarily have reduced our commercial take of salmon and steelhead we have insisted that the management regimes in place fully account for the number of fish we need for ceremonial purposes.

Obviously the tribes in the Dakotas do not have the same relationship with fisheries that we do. The point being that tribes are different and attempts at blanket solutions have never worked when applied to all tribes.

The implication of the proposed amendments seems to state that unless the Congress tells us not to, we would, for some reason, decide to hunt endangered species until they were eradicated. If this is the premise for the

- The Honorable John Breaux
Page two

amendment, it is both absurd and without merit. Why would the Indian people want to wipe out species of wildlife that we hold sacred? We spend thousands of dollars annually lobbying and in litigation to protect the fishery and to ensure that there are sufficient numbers of the various species perpetuated for our children yet unborn. You may recall our Tribes involvement in the Salmon and Steelhead Management and Enhancement Act and in the fishery provisions of the Northwest Power Planning and Conservation Act. We are in court presently regarding a FERC licensing that we see as detrimental to the fishery resource. I don't think any group has spent more time and effort to protect the wildlife resource than we have.


We have been before your committee before and always found you to be a fair man. Therefore, we are pleased that you have scheduled this hearing and we are optimistic that after you have heard from Indian people, you will appreciate the respect we have for fish and wildlife and you will understand why we will do all we can to ensure the continuation of all those species that the white man has not already wiped out.

We stand ready to work with your Committee to ensure not only the protection of wildlife but the protection of our First Amendment Rights and adherence to the principles of the American Indian Religious Freedom Act, as well.

Please make this short statement a part of today's hearing record. I would also appreciate the opportunity to submit a more detailed statement before the hearing record is closed.

Thank you.

Sincerely,



Roger Jim, Sr.
Chairman
Yakima Tribal Council

P.S. If the budget cuts in Indian programs that the Reagan Administration has requested are implemented by the Congress, we may come to you soon and ask that you consider placing the Indian people themselves under the protection of the Endangered Species Act!

July 3, 1985

Chairman John Breaux
Committee on Fish and Wildlife
House of Representatives
Washington D.C. 20515

Re: Comments of the Confederated Tribes of the Warm Springs
Reservation of Oregon on Proposed Endangered Species Act
Amendments.

Dear Congressman Breaux:

This letter will constitute the written comments of the Confederated Tribes of the Warm Springs Reservation of Oregon on the proposal to amend the Endangered Species Act to extend its application to Indian tribes and their members. The Warm Springs Tribe opposes any amendment to the Endangered Species Act aimed solely at reversing United States v Dion, 752 F2d 1261 (8th Cir. 1985), by abrogating Indian treaty rights through "express reference", as required by the Eighth Circuit Court of Appeals.

The Warm Springs Tribe recognizes that the taking of animals protected under the Endangered Species Act is an extremely sensitive matter. This is particularly true when the animal is the American Bald Eagle, a bird of enormous symbolic and religious importance to both Indian and non-Indian citizens of the United States. It goes without saying that it is in everyone's interest to preserve and protect the bald eagle and other species listed as threatened or endangered. That is our common goal. Indian treaty rights are not an obstacle to achieving that goal. Threatened and endangered species can be protected without Congressional legislation limiting treaty rights.

The purpose of any amendment to the Endangered Species Act should be to insure the conservation and perpetuation of the bald eagle and other endangered or threatened species. The problem is how best to achieve this purpose consistent with the rights and religious freedom of American Indians. The Warm Springs Tribe believes there is a solution to this problem.

In our opinion, United States v Dion provoked concern not because of the court's ruling that eagle hunting is treaty protected, but because of the apparent fact that the Indian eagle hunting in question was unregulated. It is well settled that Indian treaty rights belong to the Tribe, not to its individual members. Settler v Lamere, 507 F2d 231 (9th Cir. 1974). The Tribe, as the holder of the treaty right, has complete authority to regulate the exercise of the treaty right by the tribal members.

The Warm Springs Tribe, through the hunting and fishing codes enacted by the Tribal Council, has for many years regulated tribal members exercising exclusive on-reservations hunting and fishing rights and "in common" off-reservation hunting and fishing rights reserved by our 1855 Treaty with the United States. These tribal regulations, which are enforced by the tribal police and Natural Resources Department personnel and which are punishable by jail sentences of up to six months and fines of up to \$500, serve to protect our treaty rights by conserving our fish and wildlife resources.

Because of such conservation concerns, the Warm Springs Tribal Code (WSTC) currently prohibits "the taking, shooting, harassment, possession or transportation of the bald eagle or the golden eagle, or their parts, nests, or eggs." WSTC Sec. 350.200(7)(a). This prohibition, however, is subject to change if the Tribal Council determines, based on the best available scientific evidence, that a limited taking of certain eagles for cultural and religious purposes does not pose a conservation danger to the eagle populations on the reservation. With a tribal Natural Resources Department staff of more than a dozen, including professional wildlife biologists, we feel that we are more than capable of making our own scientific determination as to the status of the resource.

We believe that threatened or endangered species subject to Indian treaty rights must be protected, but that the protection must come from the tribal governing bodies themselves, not from the federal government imposing its will on the tribes. We are certain, that where tribal regulatory machinery exists, including a tribal wildlife code, enforcement personnel and biological expertise (or access to biological expertise), no tribe would allow bald eagles or other endangered species to be hunted to extinction on its reservation. Any tribe permitting eagles to be taken in such

numbers that there are no eagles left has committed cultural and religious suicide. That, of course, is unimaginable.

The Warm Springs Tribe believes that the concerns generated by United States v Dion could be addressed by an amendment to the Endangered Species Act, containing the following elements:

1. The Endangered Species Act would not extend to Indian tribes and their members certified as self-regulating with respect to the non-commercial taking of species listed as threatened or endangered.

2. The Secretary of Interior would establish criteria that a tribe must satisfy to obtain self-regulating status. (We suggest as a model the standards set out by Judge Boldt in U.S. v Washington for treaty fishing tribes seeking exclusive regulatory authority over off-reservation fishing by tribal members. 384 F Supp 312, 340-342[WD Wa. 1974].)

3. The Secretary of Interior would review tribal applications for self-regulating status under the Act and would certify as self-regulating those tribes that meet the standards. Once granted, certification could be withdrawn if, at any time, the Secretary determines that a tribe no longer satisfies the criteria.

It should be noted that our proposal does not allow the Secretary of Interior to look at the religious purposes for which a permit is issued by a self-regulating tribe. The reason for this is that the Secretary of Interior is in no position to determine what is and what is not a legitimate religious purpose. Traditional Indian religions are varied, complex and poorly understood by almost everyone outside of the tribe practicing the particular religion. Many Indian religions actually prohibit the discussion of religious practices and rituals outside the membership of the religious community. Accordingly, it is not only impossible but highly objectionable that the Secretary of Interior should have the final say on what is a legitimate religious purpose requiring the taking or use of endangered or threatened species. This determination simply must be left up to the individual tribal governing bodies. Abuses by a certified self-regulating tribal governing body, causing a threat to the perpetuation of the reservation's population of a certain species, may be stopped by Secretarial action withdrawing the tribe's self-regulating status.

We hope that you will give careful consideration to our proposal for an amendment to the Act. We believe our idea is a sensible and reasonable solution to the problem. Tribes with self-regulating status would be outside the application of the Act, yet the purposes of the Act would be fulfilled by the regulatory actions of the tribal governing bodies. Those tribes without self-regulating status would be subject to the Act until they get Secretarial certification. That would provide a strong incentive for tribes to set up the necessary regulatory machinery.

Thank you very much for your careful consideration of our comments. We would be happy to discuss this matter further with you or your staff at your convenience.

Sincerely,

ZANE JACKSON
Chairman, Tribal Council

hga/mt

cc: Honorable Mike Lowery
Rep. Jim Weaver
Rep. Ron Wyden
Rep. Bob Smith
Rep. Denny Smith
Rep. Les Aucoin
Senator Mark O. Hatfield
Senator Bob Packwood
Yakima Tribal Council
Umatilla Tribal Council
Naz Perce Tribal Council
Columbia River Intertribal Fish Commission

July 16, 1985

Congressman John Breaux
2113 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Breaux:

We the leaders and members of the Rainbow Kiva society of the Pueblo of Acoma wish to express our concern against the proposed amendment to the Endangered Species Act.

Such an amendment will disrupt and change our traditional and inherited ways of worship, the way our forefathers have passed on to us.

By disallowing us as well as other Native Americans the right to obtain, utilize and possess the eagle feather, the U.S. Government will once again infringe upon the natural rights of the First Americans to practice and worship using traditional and natural object.

The U.S. Government should determine and punish those who have endangered the eagle, the buffalo and other wildlife now considered endangered and leave alone, those of us who embrace the wildlife and constantly give thanks to mother nature for all that she has provided.

Major causes of the eagle being endangered are not the Indians but the ranchers who say the eagle kill their livestock. Another are the high power lines. What restitutions have the ranchers and power companies made? The eagle is killed by the ranchers who may take a tail feather but leaves the rest to waste and our electric bill continues to soar while the eagle is electricuted.

What amendments have been passed in these areas?

We are sure that the more common religious groups in today's society would object if the government denied the use of their instruments of prayer, for example, the Bible, the Koran and other items they consider sacred.

Therefore, we the leaders of the Rainbow Kiva ask that you reconsider your amendment so that our right to obtain the eagle feather and to worship as our forefathers have for generations is not denied us.

Should it come to pass that the last eagle is killed, it will not be an Indian who will kill it.

Mr. Chairman, as lawmakers you have the power to amend laws but you cannot change the rights of individual (especially Indian tribes) to their freedom of religion. We hold the eagle feathers in the highest esteem and it is an important part of our daily lives.

Respectfully,

RAINBOW KIVA LEADERS

Ventura S. Howeya
Ventura Howeya

Matthew Chino Jr.
Matthew Chino

Dennis Felipe
Dennis Felipe

Alvin Lowden
Alvin Lowden

Wilbur Salvador
Wilbur Salvador

Harry Ascencio
Harry Ascencio

Issac Hayah

Harry Felipe
Harry Felipe

Mike Sarracino
Mike Sarracino

Members
Members

Ross Lowden

Rex Salvador
Rex Salvador

Tony Chino

David Lowden
David Lowden

Benny Sanchez
Benny Sanchez

Clyde Sanchez
Clyde Sanchez

Albert Augustine
Albert Augustine

Clifford Faustine
Clifford Faustine

Conroy Chino

Members
Members

Pueblo of Acoma, N. Mex.
July 16, 1985

Dear Sirs,

This letter is for the purpose of strong objection from us Pueblo of Acoma Religious leaders on the proposed amendments to the Endangered Species Act as proposed by Congressman Boreau. We strongly feel that this proposed amendments would prohibit us and other Native American from practicing our religion. This would result in the loss of our spiritual heritage and would than also be classified as our religion or heritage being an Endangered Species for generations to come.

A lot has been written and said about our usage and belief in the eagle feathers. We strongly urge you to take the time to read, listen and learn about how we feel about the eagle and its feathers. If people would take the time to understand one another, this world would be a better place to live and people would get along without getting violent.

If you believe in any religion you would understand what the eagle feather and the usage means to us. True we don't have anything written down about our religion, like

some of the churches through out the world. But the eagle feather is as sacred to us as religious objects are to other faiths.

We are asking very little what nature and the spirits has offered to us to use for our religious purposes. We as Indians have been taught how to preserve what we use for our religious practices, we don't take the eagle or any wildlife that has been offered to us as sports men. We have usage for everything we take from nature in our religious beliefs or practices, so its very important to us that we keep the endangered species alive. We Indian people would not go to the extent of taking (or as you would put it killing off) all the endangered species. We realize we have to do something about preserving the endangered species. We feel its not right to tell us not to take or use eagles and feathers in our religious practices. You are taking our religious heritage and beliefs away from us. We are not the ones putting the eagles on the endangered species list, what about the electric companies of this country, by the big powerful ranchers and farmers of this country who shoot the eagles. And the sports men of the country who have no respect for nature and wild lifes.

As we stated before we use what birds and wild lifes we take from nature in our religious practices to live in harmony with nature. We only take from nature what we need to use. Sure there are some Indians that abuse what nature has to offer, just like any people though out the world. But for us who truly believe and practice and want to preserve our religious beliefs, we need the eagle feathers that nature has offered to us. So please don't deny us of our religious practices in the usage of eagle feathers.

We strongly urge you the elected people of Congress to learn more about us Indians in the United States of America, the land of the free. We invite you all, especially Congressman Breaux and his Committee on Merchant Marine and Fisheries to come to our reservation to visit and learn more about us Indians, before passage of this act. There is no way in writing that we can strongly emphasize the importance of the eagle feathers and wild lifes we use in our religious practices. The usage of eagle feathers by Native Americans was here long before any other man step foot on North America or long before it became the nation symbol.

So please take the time to reconsider the amendments and the time to read and learn about us. If we didn't feel this strongly about our religious beliefs, we wouldn't be opposed to this act.

Sincerely
 Lloyd D. Doolittle
 Alfred Valla
 John Shoultz
 Loungs Dison
 James C. Pinn
 Orrin Spaulding for
 Thomas Leno
 Alfred D. Valls
 Loungs & Louisa
 Harry L. Martinez

July 17, 1985

Dear Congressman Breaux:

As a native american and religious leader from the Acoma tribe located here in New Mexico. I wish to express my views, concerning the total restrictions of all native americans to hunt eagles or to possess those said feathers for religious purposes.

I feel that it is because of the lack of comprehension most non-native americans have concerning the native religious beliefs. This lack has caused a lopsided view to occur. If the courts and congress had a better understanding of the native american religions, they would be aware that the native american religion is a unification of belief, practice, and participation in religious ceremonies.

Let me refresh your memory to the definition of ceremony. Ceremony is the formal acts or series of acts prescribed by rituals, protocol or convention. In our belief, religious ceremonies are prescribed by rituals that have been passed on from generation to generation and hopefully never to cease.

The reason I mention this is to make a rebuttal to your comments or the courts comments concerning the idea that all religions are subdivided into beliefs and practices (practices to the courts is the possession of religious artifacts) as stated in your letter dated June 21, 1985. In your letter, you stated that the courts had made a distinction between religious beliefs and religious practices. The courts may have had other world religions on their mind when they set standards for the native peoples of this country, but this was a grave mistake. I feel that your statements in the letter had a sense of undermining and almost a dictatorial air that native americans must adhere to the decision of the courts. I do not agree or believe that native american religions can be so easily divided.

In addition, you stated that the first amendement gave us (native americans) absolute protection in our religious beliefs. Again, the non-native americans interpret this as to mean a division exists in our religious beliefs. Your interpretation reflected that the first amendment only protected our beliefs and not the actual practices. I feel very sad that politics are allowed to enter into the decision making of what I hold so dear.

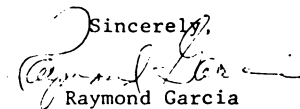
I maust reiterate that our beliefs and practices are one with no division. The belief, as well as, the possession of religious articles, such as the eagle feathers are considered as one.

I must state too that that I practice the teachings of christianity and have undivided respect for both religions. I was brought up to have faith in my native religion, as well as, the Roman Catholic Religion. I see the symbol of the eagle feathers as sacred as the host and wine of the catholic faith.

I realize my efforts to open your mind and others to our plight is minimal. The majority of native american nations are not weathly nations which can pour millions into a lobbyist effort nor do we represent a large minority. My effort here is to reach a few that would listen and hope that the few would relay our pleads to others with greater authority such as yours.

Please do not think that I am totally against any type of management to provide protection for the eagles. In fact, I am in favor of establishing some controls I would very much like to see native americans have a voice in the regulations that are to be set forth. As I stated the eagle is a very scared commodity in our existance and to lose this would be detrimental to our long lived religious beliefs.

I hope and pray that this has given you some insight to assist you and others in making a fair and justful decision.

Sincerely,

 Raymond Garcia

July 18, 1985

Congressman John B. Breaux, Chairman
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
U.S. House of Representatives
2113 Rayburn House Office Building
Washington D.C. 20515

Dear Mr. Chairman:

It is our understanding that the Federal Government is considering making changes to the Endangered Species Act, changes, which if enacted, could have a major impact upon our ability to practice our religion. We oppose any attempt by you or your subcommittee to infringe upon, prohibit, or limit the practice of our traditional religious beliefs. The American Constitution guarantees religious freedom. Our belief system includes the use of eagle feathers, as instruments of prayer. However, without that visible means of worship, that guaranteed right is useless to us.

We are the Cacique, the traditional spiritual leaders of the Pueblo of Acoma. Our responsibility includes the maintenance and practice of a set of beliefs which have been in existence for centuries, long before the arrival of Europeans to this country. Acoma history tells of the emergence of our People from a place called Shipapu. Our religious beliefs began there and have continued since time immemorial. What we hold to be sacred and dear has been passed on unchanged from generation to generation.

Our forefathers, just like yours, recognized the inherent beauty, power, and significance of the eagle. Yours chose to make it symbolic of freedom and democracy; ours chose to make it a more intimate part of their lives. Eagle feathers are used in ceremonial functions which include prayers calling for blessings upon all people, all animals and wildlife. Eagle feathers are essential to the practice of our religious beliefs.

It is our firm belief that Native Americans and the Acoma People, have not been responsible for the eagle becoming an endangered species. Although eagle feathers constitute an integral part of most Native American religious practices and ceremonies, we have not purposely killed eagles for the mere sake of killing, nor have we taken more than we needed. We, too, feel a tremendous need to protect the eagle from endangerment or extinction, but denying us access or inhibiting us from using eagle feathers is not an acceptable solution.

In order that we may continue to freely practice our religion, we ask that you refrain from making any changes to the Endangered Species Act which may be contrary to Acoma religious beliefs and practices.

Juanico Sanchez
Juanico Sanchez, Head Cacique

Connie O. Cerno
Connie O. Cerno

Agnes Pedro
Agnes Pedro

Margaret Garcia
Margaret Garcia

Velma Chino
Velma Chino

Phyllis Armijo
Phyllis Armijo

Elden Pedro
Elden Pedro

Conroy Chino
Conroy Chino

Darrell Chus

Rosie P. Antonio

Gerardine Valde

Grace O. Lewis

Alvin G. Lewis

Bennett Lewis

Lolita Chazon

Michael Torivio

IN REPLY REFER TO:

PUEBLO DE ACOMA

"THE SKY CITY"

P. O. Box 308

ACOMITA, NEW MEXICO 87034

TELEPHONE (505) 552-6606

OFFICE OF THE GOVERNOR

GOVERNOR

Merle L. Garcia

FIRST LT. GOVERNOR

Femini H. Martinez

SECOND LT. GOVERNOR

Harry Ascencio

SECRETARY

Dennis H. Felipe

INTERPRETER

Dennis Lorenzo

July 13, 1985

The Honorable John B. Breaux
Chairman Sub-Committee Fish and Wildlife
Conservation and Environment
Committee on Merchant Marine and Fisheries
U.S. House of Representatives
2113 Rayburn House Office Building
Washington, D.C. 20515

Dear Honorable Breaux:

This letter will serve as an official comment to you and your Subcommittee on the Amendments to the Endangered Species Act. The Pueblo of Acoma and its people strongly object to the Amendments as proposed in the mark up on May 2, 1985.

The Pueblo of Acoma respectfully urge you by letter dated May 28, 1985, to set aside the Amendments on behalf of all Indian tribes. The proposed amendments which would include Indians and Indian tribes within the definition of "Person" would impose regulatory restrictions on the practice of Native American Religions. The religious practices of the American Indians is an integral part of the cultural and traditional heritage of Indian identity and Tribal Governments, to guarantee the rights of American Indians in this regard. The American Indian Religious Freedom Act, P.L. 95-341 was signed into Law in August of 1978.

The Act proclaims that it is the policy of the United States to protect and preserve, for the American Indians their inherent right of freedom to believe, express and exercise their traditional religions.

The Acoma religious ceremonial functions for the benefit of all the people, wildlife, land, sky and the World, the eagle shares a vital part of the Acoma religious belief and in the same line of belief the American government recognizes and identifies the Eagle as an American symbol of Freedom, Strength and Democracy attributing this to the strong spiritual significance of the eagle. The Congress of the United States signed into Law in 1978 the American Indian Religious Freedom Act, and in that policy it states it will not impose or create barriers that stand in the way of the free exercise of Native American Religions.

Mr. Breaux, according to the Federal Fish and Wildlife Service report the greatest killer of eagles is electric power lines and this is followed by lead poisoning. Eagles eat animals that have been injured or killed by lead shot. At the last hearing that was held in Washington, D.C., I, as the Governor of the Pueblo of Acoma did testify before your Committee, and as I spoke it seemed to me that you did not care to hear Indian voices on an issue that would clearly impinge on our (Indian) Freedom of Religious practices, and those freedom are spelled, not only in treaties but in the American Indian Religious Freedom Act of 1978 and in the United States Constitution. Mr. Breaux, I really don't believe that it will be an Indian that would kill the last eagle, after all who made the Buffalo an endangered species, and nearly destroyed the eagle population.

The Pueblo of Acoma urge the Subcommittee to address this issue through consultation and hearings on a government to government processes with tribal and traditional religious leaders, and the Pueblo of Acoma and its people would like to have you Congressman Breaux and your committee visit the Sky City in an effort to arrive at a solution on eagle feathers.

As a Tribal leader if the government to government process of hearings are not held on Indian Lands I would feel the United States Government has taken "First our lands, now our Religions, what next?"

Sincerely,



Merle L. Garcia,
Governor, Pueblo of Acoma

MLG:mc

cc: New Mexico Congressional Delegation
House Committee on Merchant Marine
and Fisheries
House Committee on Interior and Insular
Affairs
House Committee on Judiciary
House Committee on Interior Appropriations
National Tribal Chairmen's Association
National Congress of American Indians



MILLE LACS BAND OF CHIPPEWA INDIANS

Executive Branch of Tribal Government

July 19, 1985

Dear Congressman Breaux,

This letter is to provide comments for the record regarding the proposed legislative amendment to the Endangered Species Act.

The Mille Lacs Band of Chippewa Indians, a Chippewa Band in east-central Minnesota, believes that the best way to ensure the protection of endangered species is through implementation of government-to-government relations with Indian tribes by the United States Department of Interior, Fish and Wildlife Service. The Endangered Species Act clearly supports the principle of government-to-government relationships to provide protection for endangered species. Further, it advocates the need to accomplish this objective through negotiation with other governments, including state and foreign governments. However, there seems to be one governmental entity the Act does not specifically address. That is Indian tribal government.

The Mille Lacs Band has historically supported and maintained a diplomatic position that espouses the goals of various provisions of the Endangered Species Act. Further, legislation has been enacted into the Mille Lacs Code to protect ecosystems upon which endangered species and threatened species are dependant {upon} that are within our territorial jurisdiction.

Additionally, the Mille Lacs Band does support the Federal Indian Policy advocated by President Ronald Reagan since January 24, 1983. This policy honors the commitment the United States made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal government affairs. The President further committed his administration to deal with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes and the fulfillment of the unique federal trust responsibility would be accomplished in accordance with the highest standards.

Secondly, the people of the Mille Lacs Band of Chippewa Indians have practiced and maintained since time immemorial traditional religious ceremonies. These ceremonies often times require the use and possession of sacred objects found within our environment. The Mille Lacs Tribal Code also strictly regulates the taking of said sacred objects and which persons may lawfully possess them. If for any reason, the taking of a species would endanger the species, alternative forms of resource can be sought and utilized. As a result,

we are profoundly concerned with any amendment which serves as a mechanism to alter the federal policy of the United States:

"to protect and preserve for Native Americans their inherent right of freedom of belief, expression and exercise of traditional religions of the American Indian... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

which was enacted in 1978 and codified in part as 92 Stat 469, 42 U.S.C.A. 1996. For we only ask, Congressman Breaux, that you recognize and defer to the protection of our right to religious freedom in your amendment deliberations.

Therefore, we believe the most successful amendment, implementation and improvement of the Endangered Species Act would be to extend the federal Indian policy into the arena of developing co-operative agreements with tribal governments nationwide. Because of our traditional religious beliefs and our commitments for the federal Indian policy are deeply tied to our sovereignty, any amendment inconsistent with the American Indian Religious Freedom Act or the President's Indian Policy of government-to-government relationships can not stand the test of time and may very well result in needless litigation between opposing governments. Such litigation most certainly would detract from needed co-operative efforts to protect the environment and all that exists within said environment. To this end, we are most committed and anxious to support you in amendments to the Endangered Species Act, which serves to enhance a federal policy which Congress has pledged itself to pursue.

Considering the importance of this issue, I respectfully request that you keep me informed of all developments in this area. I would be favorably disposed to present written and oral testimony regarding this issue to the appropriate committee of the House of Representatives.

Sincerely,



Don Weddl

Commissioner of Natural Resources

Congressman John Breaux
2113 Rayburn House Office Building
Washington, D.C. 20515

CAPTIVE RAPTORS

WEDNESDAY, JULY 10, 1985

**HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FISHERIES AND WILDLIFE
CONSERVATION AND THE ENVIRONMENT,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
*Washington, DC.***

The subcommittee met, pursuant to notice, at 10:06 a.m., in room 1334, Longworth House Office Building, Hon. John B. Breaux (chairman of the subcommittee) presiding.

Present: Representatives Breaux, Ortiz, Fields, Schneider, McKernan, and Saxton.

Staff present: Jeff Curtis, Norma Moses, Rod Moore, Thomas Melius, Ed Welch, Jacquelyn M. Westcott, Barbara Cavas, and George D. Pence.

OPENING STATEMENT OF HON. JOHN B. BREAU, A U.S. REPRESENTATIVE FROM THE STATE OF LOUISIANA, AND CHAIRMAN, SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

Mr. BREAU. The hearing will please come to order.

The hearing this morning is on H.R. 2767, legislation which would narrow the so-called raptor exemption in the Endangered Species Act. The raptor exemption provides that the restriction provisions of section 9 of the Endangered Species Act shall not apply to birds held legally in 1978 or the progeny of those birds. The peregrine falcon is the only endangered raptor that is used in falconry.

Because of the raptor exemption, captive peregrine falcons are governed, like other hawks and falcons, by the falconry regulations issued under the authority of the Migratory Bird Conservation Act. Those regulations were amended in 1983 to allow for the sale of captive bred birds.

The issue before us today is whether or not the raptor exemption is beneficial to the recovery of the peregrine falcon. Proponents argue that allowing commerce in captive bred birds stimulates the Breeding Program and relieves the pressure on the wild caught birds. Opponents contend that allowing the sale of raptors creates a market and encourages the unscrupulous to take birds from the wild and pass them off as captive bred.

The issue is highlighted by the publicity surrounding the recent undercover operation known as Operation Falcon. This sting operation, which covered 3 years, resulted in the arrest of a number of falconers and allegations that there is a widespread illegal trade in

raptors, although some members of the falconry community contend that most of the trade was, in fact, stimulated by the sting operation.

This issue has, to date, generated more heat than light. I hope that we can examine the facts before us today in a dispassionate manner and determine whether a change in the raptor exemption is warranted. Our first witness this morning will be Ron Lamberton who is Associate Director for Wildlife of the U.S. Fish and Wildlife Service.

I have a statement for the record from Congressman Norman Lent which will be made part of the record.

[Statement of Mr. Lent follows:]

STATEMENT OF HON. NORMAN F. LENT, A U.S. REPRESENTATIVE FROM THE STATE OF NEW YORK

Mr. Chairman, H.R. 2767, to amend the Endangered Species Act of 1973 regarding the sale in interstate or foreign commerce of certain captive raptors, addresses a concern that was raised at an earlier Subcommittee hearing dealing with endangered species. It pertains to the "raptor exemption", which provides that the general prohibitions against activities with respect to any endangered species of fish or wildlife do not apply to any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act (November 10, 1978) or to any progeny of any such birds. To date, the only raptors which are listed in accordance with the Endangered Species Act and which are not subject to other protective legislation are the Peregrine Falcons.

The exemption is basically an anomaly to wildlife law and was passed by Congress with assurances that it would have no detrimental effect on wild raptor populations. It was believed that the exemption would alleviate some of the human pressures on wild raptors, increase genetic diversity in captive populations, and encourage captive production of raptors for conservation, recreation, scientific, and breeding uses. However, testimony at our earliest Subcommittee hearing indicated that some individuals have manipulated the system to their own benefit, at the expense of the resource.

Therefore, H.R. 2767 would simply reinstate the prohibition against any person selling or offering for sale in interstate or foreign commerce any such species. This prohibition would not apply to any sale to Federal or state agencies or any organization, permitted by the Fish and Wildlife Service, to propagate and release Peregrine Falcons as part of an approved raptor recovery program. This would allow Peregrines to be sold for return to the wild to assist in the recovery of the species.

It is important to note that this bill does not seek to end the use of Peregrine Falcons in falconry. Falconers can continue to possess Peregrine Falcons now legally held and their progeny, and to use them in pursuit of their sport. This bill does not prohibit any falconer from taking their Peregrines across state lines to participate in meets. This bill does not hamper any Peregrine breeders in their efforts to release captive-bred birds to the wild, since Federal permits are already required for such releases.

The sale (or barter) of endangered raptors between breeders would be barred. However, as long as no consideration is paid, the donation or loan of a legally-held Peregrine Falcon to the Peregrine Fund or any other reputable breeder should not be impacted. Any breeder who can demonstrate a need for new Peregrine breeding stock to enhance his efforts to restore wild populations can obtain a permit from the Fish and Wildlife Service to allow such a transaction.

Mr. Chairman, I believe that several concerns that were raised at the earlier hearing addressing the raptor exemption have merit and I appreciate your interest in holding these hearings. I am hopeful that our efforts will provide a review of the facts in relationship to the impact that the raptor exemption has on the recovery of the Peregrine Falcons in order that we make a reasonable determination as to the wisdom of moving forward with this, or similar, legislation.

Mr. BREAUX. Ron, it is good to have you here with Mr. Clark Bavin from the Fish and Wildlife Service. We welcome you and will be pleased to receive your testimony.

**STATEMENT OF RONALD LAMBERTSON, ASSOCIATE DIRECTOR
FOR WILDLIFE RESOURCES, U.S. FISH AND WILDLIFE SERVICE,
U.S. DEPARTMENT OF THE INTERIOR**

Mr. LAMBERTSON. Thank you, Mr. Chairman.

With your permission, I will present the full statement for the record and an abbreviated statement at this time.

As always, Mr. Chairman, I am pleased to be here to discuss H.R. 2767, a bill to amend section 9(b)(2) of the Endangered Species Act. This section has commonly been referred to as the raptor exemption.

Raptors first came under the protection of the Migratory Bird Treaty Act when the treaty with Mexico was amended back in 1972. The Service has always allowed falconers to practice their sport under permit as a recognized traditional and legitimate use of raptors. Likewise, the Service has encouraged and authorized the captive breeding of raptors.

In 1978, the Endangered Species Act was amended during the reauthorization process to create a specific exemption for raptors. Under the raptor exemption which was created by that amendment, birds of prey that were held in captivity or in a controlled environment on November 10, 1978, or any progeny from such birds are exempt from the prohibitions of the act. The conference committee indicated that the purpose of the amendment was to encourage the breeding of peregrine falcons in captivity by exempting the progeny of birds held prior to enactment.

Notwithstanding the raptor exemption, the Fish and Wildlife Service continued to prohibit the sale of raptors under the Migratory Bird Treaty Act until 1983 when new standards for raptor breeding were adopted that authorized the purchase and sale of captive-bred raptors, including peregrine falcons that were previously exempt under the Endangered Species Act.

Since the sale of captive-bred peregrine falcons has only been authorized for about 2 years, it is very difficult for us to conclude whether the raptor exemption regulation is fulfilling the three reasons for which it was promulgated. The three reasons that those regulations were promulgated were (1) to alleviate some of the human pressures on wild raptor populations, (2) to increase the genetic diversity in captive populations, and (3) to further encourage captive production of raptors for such things as conservation, recreation, and so forth.

Excluding the Peregrine Fund, at the end of the last calendar year, our figures show that 65 individual breeders possessed about 227 peregrine falcons ostensibly for the purposes of breeding. Annual reports filed by these 65 breeders indicated that for 1984, 12 were successful in raising peregrines. These 12 breeders were successful in raising 79 peregrines from 172 eggs.

The disposition of these 79 peregrines was reported as follows: 25 of the captive-bred birds were transferred to other falconers or breeders, 22 were sold or bartered to other falconers or breeders, 15 were retained by the original breeders, 16 were released to the wild, and 1 died, for a total of the 79. In the same year, by comparison, the three units of the Peregrine Fund reported that they produced 281 peregrines and released 259 of those to the wild.

As you mentioned, Mr. Chairman, in 1981, the Fish and Wildlife Service launched a 3-year undercover operation known as Operation Falcon. This investigation was aimed at developing further intelligence and prosecuting individuals who were involved in the illegal traffic in raptors. I testified at length on this subject before this subcommittee on March 14, 1985. Because of that earlier testimony, I will not go into detail about Operation Falcon at this time. While this investigation is still continuing and probably will be for some time, certain information has come to light during this investigation which I would like to share with the subcommittee because I believe that it has some relevance to the bill now under consideration.

During the 3-year period of this investigation, from the spring of 1981 until the early summer of 1984, we have established reliable information so far that 71 peregrine falcons were illegally taken from the wild in the United States. In addition to that, 19 other peregrine falcons were involved in illegal activities during this period, but the source of these birds is unknown. Thus, there was a total of 90 separate peregrine falcons involved in illegal activities in the United States.

In addition, Canadian officials have reported to us that during the same period, they conducted an undercover operation into illegal raptor traffic and found that 40 additional peregrine falcons had been taken illegally from the wild in Canada. Canadian officials have reported that all 40 peregrines taken illegally in Canada were placed in captive-breeding facilities and claimed as "captive bred" in order to obtain documents so that they could be exported for profit.

In our investigation, we found that nearly all of the 71 birds taken illegally in the United States were also laundered, either through captive-breeding facilities or by individuals placing bands on the birds that were obtained from birds that had previously died or from other sources.

I might add that peregrine falcons were not the only falcons taken and illegally laundered through captive-breeding facilities. The gyrfalcon is also highly sought after, and we can document through this investigation that 26 gyrfalcons were illegally taken in the United States. Canadian officials have reported that their investigation reveals 60 gyrfalcons were illegally taken from the wild in Canada and laundered through breeding facilities.

Almost all of the peregrine falcons and gyrfalcons illegally taken from the wild in Canada were subsequently exported for sale to persons in England and the Middle East.

I want to emphasize that Operation Falcon was only a 3-year investigation and focused on illegal traffic involving raptors that were illegally taken from the wild. The investigation primarily involved the work of one undercover operative and several undercover agents used to support this operative. We stopped the covert phase of the investigation because the number of subjects had grown so large that a major job lay ahead of prosecuting them, and we are currently undertaking that job.

As we interpret H.R. 2767, it would modify the raptor exemption to make it illegal to sell in interstate or foreign commerce any otherwise exempt listed raptor, except when the sale was to a Federal

or State agency for their use in a raptor recovery program which had been approved by the Secretary, or to any private entity for participation in a recovery program under a permit issued by the Secretary.

The Department stated earlier this year in testimony before this subcommittee that our general preference is that the Endangered Species Act be reauthorized without amendment. In addition, as I discussed during my previous testimony before this subcommittee, the Service has published a notice of intent to review the entire regulatory scheme and system by which birds of prey are currently regulated under the Endangered Species Act and the Migratory Bird Treaty Act. Over 600 comments have thus far been received by the closing date of June 4, and we have formed an internal committee to review them as well as the results of Operation Falcon in light of the biological impact on raptor populations.

This review process is just now getting under way and we are reviewing those numerous comments. We have made a commitment to all parties who are involved in this matter and who are interested in raptors to make a thorough review and to use the rulemaking process with full public input before we reach a decision whether or not the current regulatory system should be changed and, if so, how it should be changed.

Mr. Chairman, this concludes my abbreviated statement. I would be happy to answer any questions.

[Prepared statement of Mr. Lambertson follows:]

PREPARED STATEMENT OF RONALD E. LAMBERTSON, ASSOCIATE DIRECTOR-WILDLIFE RESOURCES, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Subcommittee, I am pleased to be here today to discuss H.R. 2767, a bill to amend section 9(b)(2) of the Endangered Species Act of 1973, commonly referred to as the "Raptor Exemption."

As members of the Subcommittee know, when the Endangered Species Act of 1973 was passed it contained a general exemption or "grandfather" clause for any fish or wildlife held in captivity or in a controlled environment on December 28, 1973, provided it was held for non-commercial purposes. Although an exemption, it still prohibits the sale of an exempt specimen in interstate or foreign commerce. However, the Secretary may issue permits to authorize any activity which is otherwise prohibited by the act provided such activity is for scientific purposes, or to enhance the propagation or survival of the affected species. Thus, even the sale in interstate or foreign commerce can be authorized if it is for one of these purposes.

Raptors first came under the protection of the Migratory Bird Treaty Act when the treaty with Mexico was amended in 1972. The Service has always allowed falconers to practice their sport under permit as a recognized traditional and legitimate use of raptors. Likewise, the Service has encouraged and authorized the captive breeding of raptors. In the beginning the Service did not authorize the use of endangered raptors for falconry purposes as it was believed to be inconsistent with the intent of the Endangered Species Act. Likewise, bald and golden eagles were not originally authorized to be utilized for falconry purposes because of their protection under the Bald and Golden Eagle Protection Act. Also, in the beginning, the Service did not authorize the sale of any raptors bred in captivity.

In 1978, the Endangered Species Act was amended during the reauthorization process to create a specific exemption for raptors. The legislative history concerning this amendment indicates it was intended to apply only to domestic captive-bred raptors. However, as written it applies to all birds of prey, including bald eagles and many species of hawks and falcons that are endangered throughout the world. From a practical standpoint, however, it is only applicable to peregrine falcons at this time.

Under the "Raptor Exemption" birds of prey that held in captivity or in a controlled environment on November 10, 1978, or any progeny from such birds, are exempt from the prohibitions of the Act. The Conference Committee indicated that

the purpose of the amendment was to encourage the breeding of peregrine falcons in captivity by exempting the progeny of birds held prior to enactment. The main difference between this exemption and the "grandfather" clause is that raptors held for commercial purposes can continue to be sold. The "grandfather" clause, on the other hand, does not permit endangered species to be sold and does not apply to those held for commercial purposes.

Notwithstanding the "Raptor Exemption," the Service continued to prohibit the sale of raptors under the Migratory Bird Treaty Act until 1983, when new standards for raptor breeding were adopted that authorized the purchase and sale of captive-bred raptors, including peregrine falcons that were exempt under the Endangered Species Act.

Since the sale of captive-bred peregrine falcons has only been authorized for two years, it is difficult to conclude whether the "Raptor Exemption" regulation is fulfilling the three principal reasons for which it was promulgated: (1) to alleviate some of the human pressures on wild raptor populations, (2) to increase genetic diversity in captive populations, and (3) to further encourage captive production of raptors for conservation, recreation, scientific, and breeding purposes. Excluding the Peregrine Fund, at the end of the last calendar year, 65 individual breeders possessed 227 peregrine falcons ostensibly for breeding purposes under proper permit. Annual reports filed by these 65 breeders indicated that for 1984 only 12 were successful in raising peregrines. These 12 breeders were successful in raising 79 peregrines from 172 eggs. The disposition of these 79 peregrines was reported as follows:

Transferred to other falconers/breeders	25
Sold or bartered to other falconers/breeders.....	22
Retained by the breeder	15
Released to the wild	16
Died.....	1
Total	79

In the same year, the three units of the Peregrine Fund reported that they produced 281 peregrines and released 259 to the wild.

In 1981, the Service launched a 3-year undercover investigation known as "Operation Falcon." This investigation was aimed at developing further intelligence and prosecuting individuals who were involved in the illegal traffic in raptors. I testified at length before this Subcommittee concerning Operation Falcon on March 14, 1985, so I will not go into the details at this time. While this investigation is still continuing and probably will be for sometime, certain information has come to light during this investigation which I now would like to share with the Subcommittee because I believe it has relevance to this bill under consideration.

During the 3-year period of this investigation, from the spring of 1981 until the early summer of 1984, we have established reliable information so far that 71 peregrine falcons were illegally taken from the wild in the United States. In addition to that, 19 other peregrine falcons were involved in illegal activities during this period, but the source of these birds is unknown. Thus, there was a total of 90 separate peregrine falcons involved in illegal activities in the United States. In addition, Canadian officials have reported to us that during the same period they conducted an undercover operation into illegal raptor traffic and found that 40 peregrine falcons had been taken illegally from the wild in Canada. Canadian officials have reported that all 40 peregrines taken illegally in Canada were placed in captive breeding facilities and claimed as "captive-bred" in order to obtain documents so that they could be exported for profit. In our investigation we found that nearly all 71 birds taken illegally in the United States were also laundered, either through captive breeding facilities or by individuals placing bands on the birds that were obtained from birds that had previously died, or from other sources.

I might add that peregrine falcons were not the only falcons taken illegally and laundered through captive breeding facilities. The gyrfalcon is also highly sought after and we can document through this investigation so far, that 26 gyrfalcons were illegally taken in the United States. Canadian officials have reported that their investigation reveals some 60 gyrfalcons were illegally taken from the wild in Canada and laundered through breeding facilities. Almost all of the peregrine and gyrfalcons illegally taken from the wild in Canada were subsequently exported for sale to persons in England or the Middle-East. A few of these peregrine falcons were illegally smuggled into the United States. Most of the peregrine and gyrfalcons illegally taken in the United States stayed here to be utilized for falconry purposes, although some were exported for sale to the Middle-East. Falconers in this country

hold these two species in high esteem. While the gyrfalcon is difficult to obtain and to care for because of its preference for northern habitat, the peregrine is easier to obtain and keep for falconry purposes.

I want to emphasize that Operation Falcon was only a 3-year investigation and focused on illegal traffic involving raptors that were illegally taken from the wild. The investigation primarily involved the work of one undercover operative and several undercover agents used to support this operative. We stopped the covert phase of the investigation because the number of subjects had grown so large that a major job lay ahead to prosecute them. There is no reason to believe that during this period we uncovered all of the illegal traffic, nor documented all the illegal taking of peregrines or other raptors from the wild.

It is impossible for us to estimate the number of peregrine falcons that have been illegally taken from the wild each year and laundered through captive breeding facilities. We only know there is a demand for peregrines and there is an insufficient number of conservation officers in the States, the Federal Government and in Canada to maintain surveillance on all peregrine nests. We know that peregrines are taken from the wild illegally in Canada, smuggled into the United States and claimed as captive bred. The Canadians also have difficulty stopping this illegal activity. For example, in the Yukon Territories there are only 12 conservation officers for that entire area. They have had continual problems with nests being robbed and last year set up a video camera as surveillance of one nest. That nest was robbed.

As we interpret H.R. 2767 it would modify the "Raptor Exemption" to make it illegal to sell in interstate or foreign commerce any otherwise exempt listed raptor, except when the sale was to a Federal or State agency for their use in a raptor recovery program which had been approved by the Secretary, or to any private entity for participation in a recovery program under a permit issued by the Secretary. Such a permit to a private entity would have to be issued in accordance with Section 10(a), which is the same permitting requirement that would exempt any private entity from any prohibition under the Act provided the purpose was for scientific use or to enhance the propagation or survival of the affected species. In other words, under current law, a private entity could obtain a similar permit.

The intent of this amendment appears to prohibit sale of otherwise exempt raptors, except for use in a raptor recovery program approved by the Secretary. However, we note the prohibitions contained in Section 9(a)(A) and (E) making it illegal to import and export, and to deliver, receive, carry, transport or ship raptors in interstate or foreign commerce for commercial purposes still would not apply to exempt raptors.

The Department stated earlier this year in testimony before this Subcommittee that our general preference is that the Endangered Species Act be reauthorized without amendment. In addition, as I discussed during my previous testimony, the Service published a notice of intent to review the entire regulatory system relating to all birds of prey under the falconry and captive breeding regulations issued pursuant to the Endangered Species Act and the Migratory Bird Treaty Act. Over 600 comments had been received by the closing date of June 4 and we have formed an internal committee to review them as well as the results of Operation Falcon in light of the biological impact on raptor populations. This review process is just getting under way and no conclusions have been reached. We have made a commitment to all parties interested in raptors to make a thorough review and use the rulemaking process with full public input before we reach a decision whether or not these regulations should be changed and, if so, how they should be changed.

Mr. Chairman, this concludes my prepared statement and I will be happy to try to answer any questions the members of the Subcommittee may have.

Mr. BREAU. Well, are you suggesting that Congress do nothing with regard to the raptor exemption until the review is completed, or do you suggest that we move forward with the legislation? Which one makes your job as an enforcement agent better?

Mr. LAMBERTSON. Mr. Chairman, we have consistently been concerned that the endangered species reauthorization not get bogged down with a number of amendments.

Mr. BREAU. Well, we are going to move forward. It is already out of the committee. So, now we are faced with a separate piece of legislation.

Mr. LAMBERTSON. That is our primary concern.

Mr. BREAUX. That is already out of the committee without any amendments relating to the falcon issue. Now, we have a piece of legislation which removes the falcon exemption as a separate piece of legislation. Is it advisable to move forward with that now or to wait until your review is over with? What does the Department recommend?

This is an enforcement issue. The policy here is enforcement. Does the raptor exemption make it more difficult? Is it offset by the fact that it tends to encourage the taking of falcons and the breeding of falcons and encouraging the increase of the population, or does it not do that? We are balancing interests here, and you are the chief of law enforcement, and I guess we are looking to you and Clark for some recommendations. None of us are enforcement experts; we rely on what you recommend what we should do in this area.

Mr. LAMBERTSON. Mr. Chairman, our recommendation is that we go ahead and complete the extensive review that we currently have underway. However, we do think that we are far enough along in that review to provide some very relevant information.

For example, the fact that about 130 peregrines have been taken out of the wild, some of those from populations that are highly endangered, I think, is something that Congress needs to know about. At the same time——

Mr. BREAUX. That is illegal now, right?

Mr. LAMBERTSON. That is currently illegal.

Mr. BREAUX. So, what I am trying to figure out is how do we help stop that by preventing the trade of falcons that are, in fact, captive bred? How do we affect those illegal activities which I imagine some would argue would increase because of the lack of captive bred animals that would be available, so there would be more people going out in the wild and trying to rip off wild falcons because they can't buy captive bred falcons any more.

Mr. LAMBERTSON. Mr. Chairman, the major issue we are looking at is to what extent our current regulatory system might be facilitating removal of birds from the wild. In other words, there is a system by which people can go out and remove birds from the wild, put those birds into captive-breeding facilities, use our system then to claim that they are captive-bred birds, and then be free to sell and dispose of them.

Therefore, our major issue is, does our current system facilitate this kind of an operation?

Mr. BREAUX. Well, we have been battling this around with alligators and sea turtles over the years and a number of different species around the world. Is there no way that captive bred animals—I might also add scrimshaw—is there any way that we can properly tag captive bred falcons with a tag which could be issued by the Fish and Wildlife Service and any bird that does not have the tag would be considered an illegally acquired animal?

Mr. LAMBERTSON. So far, Mr. Chairman, we have found no fool-proof system where we can ensure that once we mark a certain animal that that animal can't be in, effect, detagged when it dies and the band moved to another bird and therefore claimed to have been captive bred. It hasn't been developed yet. We are going to continue to look to see if such a system can be developed, however.

Mr. BREAUX. I guess if the tag were marked with the age of the animal, it would be difficult to remove the tag and clip it off or what have you and then put it on a younger bird when the date of the old tag would indicate it is clearly not that bird.

Mr. LAMBERTSON. Well, from the enforcement standpoint, it is very difficult for our agency to take a mature bird that has a band on and determine whether or not that is the original bird that has the band.

Mr. BREAUX. My experience is limited, I guess, compared certainly to the Service's, but it is that anytime we have been able to encourage the captive bred propagation of any species which was endangered or threatened we were better off doing it. The alligator, I guess, is a real example of how, when we were allowing the captive bred harvesting of alligators, all of sudden a lot more attention was being paid to the propagation of additional alligators, and they promptly came off the endangered and threatened species list. Now, they are almost a nuisance problem in many areas. I think that the captive bred program contributed greatly to doing that.

So, you are not really recommending we move forward with this legislation. You would like to complete your analysis and make some recommendations to the committee, or what?

Mr. LAMBERTSON. Our intent is to make available the data and the facts that we have found so far in Operation Falcon and then proceed with our regulatory review and a lot of public participation working with the different interest groups and trying to come up with a perfected system.

Mr. BREAUX. OK.

Any questions, Mrs. Schneider.

Mrs. SCHNEIDER. Yes, thank you.

Mr. Lambertson, I would like to define the bottom line question that we are looking at for this hearing: Whether or not the raptor exemption assists or detracts from the recovery program. It seems to me that the benefits of a commercial captive breeding program override—I mean, I actually want your opinion as to whether or not you think that the benefits outweigh the risks that are involved in the illegal activities that are inherent in such a program.

I was just reading through some of the reports here, and it says that the breeders produced a total of 65 peregrine chicks in 1984 and they released only 13 into the wild, whereas the federally supported Peregrine Fund produced 270 chicks and released 254 into the wild. So, the claims that captive breeding will increase the wild population, I think, are, at best, pretty weak.

So, I would like to have your opinion as to the benefits versus the risks involved for the illegal activities that are inherent in such a program.

Mr. LAMBERTSON. First off, I would like to state that the Peregrine Fund is not operating under this exemption. The Peregrine Fund is operating under a Federal permit that was issued prior to the exemption. Therefore, I think we have to be very careful not to conclude that were it not for this exemption, the Peregrine Fund could not operate. Legitimate operations like the Peregrine Fund could and can still get permits under the Endangered Species Act without regard to the section 9(b) exemption.

The big question is, Has there been an offset of birds taken from the wild and encouraged by means of this raptor exemption vis a vis the recovery program? We are concerned when we see that 71 peregrines were removed from the wild, many of those in Western States with very small populations, some States having one and two nesting pairs. That is a major concern.

The big question is, to what extent has this regulatory system that we have developed encouraged that kind of activity, and there is no answer. I don't think we will ever reach that answer.

We know that that illegal activity will probably occur even without our regulatory program, even without a captive breeding program, even without the sales provisions. To some extent, that illegal activity will continue. But our primary concern is to determine to what extent we have possibly facilitated additional removal?

Mrs. SCHNEIDER. Facilitated additional what?

Mr. LAMBERTSON. Additional removal of wild birds.

Mrs. SCHNEIDER. I see. Well, is there any other way to detect illegal trafficking besides the present undercover sting operation?

Mr. LAMBERTSON. Through a very stiff regulatory program, we can impose some controls.

Mrs. SCHNEIDER. A stiff regulatory program implies that you have to have the personnel available to oversee and enforce this program. Is that realistic?

Mr. LAMBERTSON. And we have to also impose requirements on the people who are involved in this activity as far as issuing reports, being subject to inspection, and those kinds of things.

Mrs. SCHNEIDER. Is there any more secure method of identifying the birds besides the present rather imperfect mode of banding these birds?

Mr. LAMBERTSON. None that we have been able to identify. There are some other possibilities we have been looking at like footprinting, but currently the banding method seems to be the best. However, in the 600 comments we have received, we have asked exactly those kinds of questions, and we are just currently analyzing those now.

Mrs. SCHNEIDER. Granted you are still analyzing the material, but from your testimony which obviously is part of the record, I am inclined to assume that you are suggesting that the status quo is the best that you could possibly do in preventing the capturing of these birds from the wild. Are we looking at a situation that has no positive solutions here?

Mr. LAMBERTSON. No; I think that the approach we are taking through the regulatory review process will allow people to give us the kinds of suggestions that will improve the program. Falconers and the environmental groups and others are making very positive suggestions to us. Our problem is, currently we are not to a point to draw conclusions as to whether or not there should be changes in the current regulatory program. It will be October before we are ready to do that.

Mrs. SCHNEIDER. I see. Some of the folks that have been commenting through this regulatory process, I understand, have indicated that it is greater thanks to the banning of DDT rather than the efforts of the Federal Government that has spurred the increase of the numbers of peregrine falcons.

Mr. LAMBERTSON. Let me just say it was the Federal Government that banned DDT, but they are correct from the standpoint that the real problem with the peregrine population historically has been the egg thinning problem caused by DDT. However, because of that problem, we have in some areas very small populations and our recovery program requires that we protect those very small populations and that we ensure that there is as little illegal taking from those populations as possible.

Mrs. SCHNEIDER. And how do you do that?

Mr. LAMBERTSON. Through strict law enforcement is the best mechanism.

Mrs. SCHNEIDER. As we found out through this sting operation, the law enforcement efforts don't really come anywhere near capturing the number of people who are involved in this illegal activity.

Mr. LAMBERTSON. That seems to be the continual problem with law enforcement. There are always more speeders than there are highway patrolmen.

Mrs. SCHNEIDER. And if you hadn't had the sting operation, then you would not have really had any kind of impact on the whole process.

Mr. LAMBERTSON. There is no doubt that when it comes to measuring illegal take from the wild, it is very difficult for us to do. It is also very difficult to make cases in these highly secretive operations. It is very difficult to prove that the bird that you have in your back yard was taken illegally from someplace in the middle of Wyoming, and the undercover operation seems to be the best method by which we can do that. But that doesn't mean that we can't develop a regulatory program that has the kinds of marking and reporting requirements that would discourage that kind of activity.

Mrs. SCHNEIDER. Thank you.

Thank you, Mr. Chairman. I have no further questions.

Mr. BREAUX. Congressman Ortiz.

Mr. ORTIZ. Thank you, Mr. Chairman.

What is the life expectancy of the peregrine falcon?

Mr. LAMBERTSON. The experts tell me about 20 years.

Mr. ORTIZ. One of the questions that I would like to ask here is, how were you able to acquire the figures that—I understand you said 71 were removed.

Mr. LAMBERTSON. Yes, that is right.

Mr. ORTIZ. How did you develop that number?

Mr. LAMBERTSON. That number was derived from a number of case reports and investigative files, transcripts of hearings, transcripts of tape recordings, all of the activities associated with our undercover operation. Whenever reference was made to a bird being removed from the wild and we could confirm that in our investigative process, we then counted that bird. Seventy-one birds have been confirmed through a number of processes in our undercover operation as having been removed from the wild.

Mr. ORTIZ. In the illegal commerce of the falcons here, how many were U.S. citizens that were involved in the removal or the illegal commerce?

Mr. LAMBERTSON. Let me have Mr. Bavin handle that.

Mr. BAVIN. Of the 71 birds that we could document taken illegally in the United States, they were taken illegally by U.S. citizens. In addition to that, we can document an additional 33 birds that were taken from the wild in Canada by Canadian citizens. Canadians have information that show that as many as 40 birds were taken, but we can substantiate from our case that 33 birds were taken illegally in Canada.

Mr. ORTIZ. Those birds that were taken by your Service, where are they now?

Mr. BAVIN. Do you mean the birds that were seized by the agency? Of the ones that have been forfeited to the Government, some of those have been returned to the wild or placed in appropriate facilities to accommodate them. The ones that are still under seizure that have not been forfeited are located at different places throughout the country to be held by people to take care of them until the legal process is completed.

Mr. ORTIZ. I understand that—Is there any problem with communicating with some of these groups and your agency as to how we could work together, any communications problems?

Mr. LAMBERTSON. Well, I think there are always communication problems when you have a regulatory program. The current review process we are going through is trying to facilitate more communication. The process asks first, what are your views on how we can improve the current program? After we get those views, we are going to prepare a draft report where we say, here is what everyone thinks can be done. We are then going to make that report available to the different interest groups for their review and further refinement. Then, after we try to reach a consensus on "here is how the program could be improved," we will be making recommendations to the Secretary.

Mr. ORTIZ. In some of these cases that were taken to court, have we been successful in prosecuting? Have any cases been kicked out or anything like that?

Mr. LAMBERTSON. Mr. Bavin can give you a rundown of the cases.

Mr. BAVIN. We have filed charges so far in this investigation against 54 individuals. Of those, we have 40 convictions, and we have 3 acquittals, and the remaining cases are either pending or they are foreign nationals who are fugitives. So, we have 40 convictions.

Mr. ORTIZ. Thank you very much.

Thank you, Mr. Chairman.

Mr. BREAUX. Mr. Saxton.

Mr. SAXTON. From your testimony, I take it that the private breeding and release of these birds is, to some degree, successful. Both the Federal Government and private groups are involved in breeding in captivity and then releasing the birds. Do you have evidence to show to what degree that is successful? In other words, when the birds are released, do they do well and do they survive a certain percentage of the time or—

Mr. LAMBERTSON. Mr. Saxton, I would suggest you ask that question of Mr. Cade. The successful release program has been carried out primarily by the Peregrine Fund and Dr. Cade's program. They monitor the success of that and follow it closer than we do.

On the other hand, the falconers, breeders themselves, have had much less success as far as their breeding in captivity.

Mr. SAXTON. I am sorry, I didn't—

Mr. LAMBERTSON. The falconers and other breeders, other than the Peregrine Fund, have not had the same level of success that the Peregrine Fund has had.

Mr. SAXTON. Is there a difference in the way the groups operate in preparing falcons for the wild?

Mr. LAMBERTSON. Well, my own personal view is that it has to do with the professional expertise that the Peregrine Fund has, the facilities and the capabilities they have, the monetary and other resources they have. They have a very sizable program. It has been very well executed, and it is not the sort of thing that an amateur can pick up and do starting tomorrow. It is a very complicated procedure.

Mr. SAXTON. Would you suggest that there is a need for closer coordination of the expert abilities that exist with the successful fund as opposed to private falconers in training and certain types of procedures that might be mandated, if you will, for private groups who wish to take part in such activities?

Mr. LAMBERTSON. I am reluctant to make any commitments on behalf of Mr. Cade to carry on training programs, but I am sure that he currently makes available to other interested breeders the techniques that could facilitate successful operations.

Mr. SAXTON. I guess on a related subject, Congresswoman Schneider pointed out that in the figures comparing the official breeder group that we sponsor to private groups, the success ratio in terms of those numbers of birds or percentages of birds that have been released differs greatly. Has there been any effort to encourage in some way private breeders to release more birds?

Mr. LAMBERTSON. There hasn't been by the Government. I think that is something we probably should talk about as we go through this process, this regulatory program we are looking at. I would like to find out exactly why they are reproducing this number of birds and to encourage more release to the wild.

Mr. SAXTON. But there hasn't been any overt effort in that regard.

Mr. LAMBERTSON. There hasn't, no, sir.

Mr. SAXTON. Thank you.

Mrs. SCHNEIDER. Would the gentleman yield on that question? I would be interested in knowing if that could be part of a regulatory reform proposal that you might initiate. It seems to me that an appropriate proposal might say that x percentage of the number of falcons that are bred must be released into the wild. Would you consider making such a regulation?

Mr. LAMBERTSON. That is something we could certainly look at. I don't think we could compel people to produce birds and require them to release them to the wild because of the exemption under the act. However, our regulatory program was announced with the purpose of producing birds for the wild and release in the wild and other purposes. So, I think it would be very consistent for us to encourage, as much as possible, that kind of activity.

Mrs. SCHNEIDER. Your comments seem almost contradictory. How do you encourage? I would have thought that you would have

been encouraging that already. How do you encourage it without a regulation? And, given the illegal activities that are ongoing, I think that to say, well, yes, we will tell everybody to please release more into the wild, that doesn't seem to have any teeth behind it.

Mr. LAMBERTSON. Let me ask Mr. Bavin whether or not we could require, as a permit condition under the current legislation, a certain percentage be released into the wild.

Mr. BAVIN. I believe we could do that under the Migratory Bird Treaty Act which is a much broader act, but the raptors under this act, the Endangered Species Act, that are captive bred are exempt from the act, and we have no regulatory authority over them.

Mrs. SCHNEIDER. So, it would have to come from us.

Mr. BAVIN. Well, or we would have to do it under the Migratory Bird Treaty Act. We would have to look into that. My guess would be that we would have that authority.

Mrs. SCHNEIDER. OK.

Mr. SAXTON. Would you be willing to try to determine whether or not you have that authority pursuant to some act and, if you do, let us know, and if you don't, tell us that as well?

Mr. BAVIN. Certainly. We could provide a statement for the record, sir.

Mr. SAXTON. Thank you.

[The following was received for the record:]

RELEASE OF BIRDS INTO THE WILD

Traditionally, all wildlife belongs to the sovereign, or, in the case of the United States, to the people as a whole. By international treaties, the United States government has agreed to protect migratory species, including raptors. In 1918 and by subsequent amendments for the Migratory Bird Treaty and Conservation Acts, Congress made it illegal to possess or to engage in other activities with regard to migratory birds, including raptors, except in compliance with the regulations issued by the Secretary of the Interior. The courts have consistently held that persons cannot have or acquire a private property right to take or to possess migratory birds. Raptor species are a public, not a private, resource. Possession of raptors is a privilege, not a right. Except in accordance with regulations or permits issued by the Department of the Interior, it is against the law to possess a raptor.

The Department of the Interior, acting through the U.S. Fish and Wildlife Service (Service) has made provision in its regulations for captive propagation or raptors. Following amendments to the Endangered Species Act of 1973, which provided for a raptor exemption, the Service circulated for public comment, and eventually published, regulations which dealt with raptor propagation. Those regulations and Congressional intent underlying the statutes protecting raptors are clearly to benefit the public resources of the United States by providing for additional stock to be released to the wild and by reducing pressure on wild populations. Since it is illegal to possess a raptor without a permit, and a purpose underlying the raptor propagation permit is to enhance wild populations, a condition of the permit authorizing raptor propagation activities could legally require the person utilizing that permit to release a reasonable portion of the progeny produced by the permitted activity to the wild. The Service will consider requiring this type of condition during its review of the birds of prey regulatory frame work.

Mr. BREAUX. I agree. I don't see why under the Migratory Bird Treaty Act you could not require a certain number to be released to the wild if they are going to get a permit for breeding falcons in the first place. I would think that is certainly something that needs to be looked at as a condition to getting the permit from the Service. You would have to have a certain percentage, half or whatever is appropriate, to be released to the wild in order to be able to continue.

The other thing I want to get into is that Mr. Frank Bond who will testify later makes a number of allegations about operation falcon in which he charges that the civil rights of various operations were, in fact, rather grossly violated by the Service in the sting operation. I would like you, if you could, to comment on some of the allegations.

They talk, for instance, of an undated and unsigned summary paper entitled "Operation Falcon" which apparently found its way into public dissemination which smears, they say, by innuendo many of the U.S. falconers and people who are involved in the propagation of falcons. He said the document included such things as lists of occupations of people purportedly arrested and listed as defendants when, in fact, some were not.

Has this been brought to your attention, I would ask, and is it correct, and, if so, what is being done or what action has been taken?

Mr. LAMBERTSON. Yes, Mr. Breaux. We are well aware of that. We had a brief discussion with you at our last hearing on that, and we have followed through with that. We were also very concerned over the release of that document. That document was prepared as an internal document for our agents' and State agents' use at the time of what we call the take down or the arrest. The intent of that was only to brief the agents who were involved as to some of the allegations so that as they were making their inspections, as they were carrying out their investigations, they would be aware of some of the allegations that had been made by other defendants so that any leads could be followed up.

It was never intended to be released to the public. On the contrary, with these kinds of documents, we exercise extreme control to ensure that they are not released to the public.

Mr. BREAU. That didn't happen in this case.

Mr. LAMBERTSON. We do not know how that got out. We do know that one or two State agencies received it anonymously in the mail. We have been unable to figure out where they got it from. We have found a brick wall as far as being able to document where that came from. We are very concerned that that sort of thing happened.

Mr. BREAU. You know, if I were on a list in a document saying I had been arrested and charged with something when in fact I wasn't charged and that gets disseminated around the country, it would be pretty difficult to explain that to all of my friends and business associates.

Mr. LAMBERTSON. I agree completely. It is totally inappropriate for that to have been out. As I said, its only intent was to brief our agents on possible leads that they should be aware of.

Mr. BREAU. What has been specifically done to try to limit the access to that type of information or those types of documents which, in fact, are not accurate.

Mr. LAMBERTSON. Well, in the future, on any documents that are prepared like that, as has been our current practice, we will very tightly control access to those documents. For example, Mr. Chairman, even though I am the program manager for law enforcement, I do not see those documents unless there is an absolute need for it. I was not aware of this document. No one within the directorate

was aware of this document. It was not even disseminated within our agency. Very few law enforcement agents within our agency had access to that document, it was so tightly controlled. However, notwithstanding that, somehow, it did get out, even though we do know a number of State agents had it also for their purposes.

Mr. BREAUX. Were any groups or organizations given information regarding operation falcon which were not given to the general public?

Mr. LAMBERTSON. No, not that we are aware of, sir. The only releases we make are pursuant and consistent with the Freedom of Information Act.

Mr. BREAUX. Mr. Bond, in his testimony, says that it is their opinion that apparently the Audubon Society was doing press releases simultaneously with the Service, including numbers of falcons that they have serious doubts and concerns about. This is Mr. Bond's statement, and indicates that he questions the propriety of allowing Audubon access to information until it was released to the public.

Is that just completely not correct?

Mr. LAMBERTSON. We can say, Mr. Chairman, that that information did not come from us. However, you have to be aware that there are a number of sources where that information could have come from. The Department of Justice, U.S. attorneys, and State agencies, for example, did have different pieces of that puzzle that they could have put together. We did not provide that information.

Mr. BREAUX. You know, if I were a member of an organization that was being investigated, I would be pretty concerned about others issuing press releases outside of the people doing the investigation particularly if the releases contain information that only would come from the people in fact doing the investigation. How do you stop that? I mean, are we going to have sting operations that some groups are privy to and documents that are being thrown around the country that are, in fact, incorrect? Doesn't that make your sting operation look pretty shabby?

Mr. LAMBERTSON. Mr. Chairman, the thing is that you have been in Washington long enough to know about leaks out the back door. We will continue to do everything we can to ensure that that doesn't happen again. We are certain in this case that that material did not come from our agency, however. There were facts and figures in there that were not consistent entirely with our facts and figures, so we don't think it even went out the back door of our agency, and we know it didn't go out the front door.

Mr. BREAUX. Is it a fact that some groups did have information that was not made public with regard to operation falcon, the sting operation?

Mr. LAMBERTSON. I haven't seen that Audubon press release for some time, so I am not sure to what extent it was inconsistent or went further than the information that was in our press release.

Mr. BREAUX. I think the thing that has to be emphasized, if not by this committee, certainly by other committees in the Congress, that if you are doing a criminal undercover investigation, you are talking about some very, very serious allegations of crimes against the Federal Government, and this cannot become a press release operation by individuals or by the front door, the back door, or

through the chimney or through the window. You don't have undercover criminal sting operations that some people are privy to and some are not.

Mr. LAMBERTSON. I completely agree, Mr. Chairman. The extent of our concern is not just with the public image, but it also has to do with jeopardizing our cases. The release of improper information could be viewed by a Federal judge as jeopardizing that case and result in the dismissal of charges. So, we are always very careful with the kind of information we put out to be sure that it is carefully coordinated with the Department of Justice and that we are not doing something in the name of getting public attention that could jeopardize the prosecutions.

Mr. BREAU. It is further stated that as of to date, no charges of any defendant based on the falcon exemption have been brought. Is that correct?

Mr. BAVIN. I can only add, Mr. Chairman, that in one particular trial, the defendant claimed the raptor exemption as a defense, and the judge did not agree with that defense. So, it has been used in one case. There are no charges brought under the exemption per se because the exemption exempts them from the prohibition, so there would be no charge under the prohibition.

Mr. BREAU. You have levied charges against a number of people which were caught up in operation falcon, have you not?

Mr. BAVIN. Yes.

Mr. BREAU. How many, approximately?

Mr. BAVIN. We have charged 54 people totally.

Mr. BREAU. What, specifically, is their basic charge? Under what act were they being charged?

Mr. BAVIN. They were being charged under a number of acts, some under the Endangered Species Act, some under the Migratory Bird Treaty Act, some under the Lacey Act, some under the smuggling laws, some under false statements, a number of things.

Mr. BREAU. And of the 54 that have been charged, only 1 has tried to use the defense that his operations were part of the exemption because they were captive bred?

Mr. BAVIN. Well, now, that is not—let me expand on that just a moment. A number of defendants attempted to claim that their birds were captive bred and that they came, therefore, under the exemption because they were wild caught birds that were taken from the wild, placed in breeding facilities, obtained yellow bands on them which indicate that they are captive bred, and then would be free to move in commerce.

Now, we knew because of the contact we had through the undercover operation that this was untrue. In most of the cases, of the 40 convictions, most of those have been guilty pleas and they have not had trials. I said that at one trial, a particular defendant did use that defense in court.

So, yes, one has used it officially in court, but a number of individuals would have used the exemption under the act if we would not have known through our undercover activities that their claims were untrue.

Mr. BREAU. Have any of the cases been disposed of or are they all still in various stages of litigation?

Mr. BAVIN. Of the 54 cases charged to date, 40 have been disposed of by convictions, 3 by acquittals.

Mr. BREAUX. Considering the number of falcons that we have or estimate to have in this country, is the illegal operation significant or somewhat significant or, as some would say, does it have no serious effect on the population; that while it is illegal and it is wrong, let's not make a big deal out of it because it represents only a very small portion of the entire population?

Mr. LAMBERTSON. Mr. Chairman, if you take the peregrine species as a whole throughout the North American Continent, this level of removal would not be significant. However, you have to recognize that we have different subspecies that have different levels of protection. Some are threatened and some are highly endangered.

Our concern is that some of these birds were removed from Western States where they are highly endangered, very few breeding birds. Had they removed some of those from the eastern Arctic, we wouldn't have been concerned, but when they remove them from States like Utah and Colorado where there are very few breeding birds, we are very concerned.

Mr. BREAUX. As an aside, none of these have raised a defense of native Indian rights, have they?

Mr. LAMBERTSON. No, sir.

Mr. BREAUX. If there are no other questions at this point, I would like you folks to stay around if you can, because I want to get the testimony from the next panel, and perhaps it will generate some additional questions for both of you. We appreciate it.

This panel will be excused, and we would like to welcome up our next panel which will consist of Mr. Robert Berry who is president of the North American Raptor Breeders Association; Dr. Tom Cade, president of the Peregrine Fund; Mr. Jeffrey Broberg who is from my district in Lafayette, Louisiana; Mr. Frank Bond, North American Falconers Association; Mr. Stan Senner, executive director of the Hawk Mountain Sanctuary; and Mr. James Leape, counsel for the wildlife programs for the National Audubon Society.

Mr. Berry, we have you listed first. If you would go ahead and proceed with your testimony, we would appreciate it.

STATEMENT OF ROBERT BERRY, PRESIDENT, NORTH AMERICAN RAPTOR BREEDERS' ASSOCIATION

Mr. BERRY. Mr. Chairman, my name is Bob Berry. I am from Sheridan, WY. I am the president of the North American Raptor Breeders' Association.

I think the issue at hand is whether or not the sales of domestically bred peregrines will harm wild peregrine populations. In our view, captive sales will, in fact, benefit the wild peregrine population as have the sales of other captive bred quasi-wildlife, including waterfowl, game birds, game fish, furbearers, and, as you have stated, the alligator in Louisiana. These samples of quasi-wildlife have been the subject of commerce in this country for many years. Captive breeding is the major source of most public and private stocking programs providing an alternative source of wild birds and animals to supplement wild populations.

Falcon breeding is not a business, as some have stated. It is really a labor of love. Nevertheless, the breeder, like the amateur dog and cat breeder, is entitled to some sort of compensation for his basic costs. This cost recovery concept has been a tremendous incentive to Peregrine Falcon Breeding Programs encouraging more breeders to get into the breeding business and enabling these breeders to purchase valuable breeding stock that was not otherwise available.

The numbers that I have indicated in my written statement are impressive, with nearly a 400-percent increase in both the numbers of private breeders and the numbers of peregrine falcons held for breeding in the 4-year period from 1981 through 1985. In 1981, we only had 20 breeders holding any peregrines in this country. In 1985, we have 89 peregrine breeders holding 327 peregrines in this country. That is a typewriting error on your paper. I show 338, but there are really 327. There are 338 eggs, and we have produced 82 progeny to date. We had 34 breeders who had peregrines laying eggs and 20 breeders produced 82 young falcons. 21 of these birds were contributed or sold for conservation purposes. This is 26 percent of our production.

Our best estimate of future production lies in the number of adult peregrines that we are holding for breeding which currently stands at 327 birds which is almost double the number of breeding peregrines held by the Peregrine Fund in their combined facilities. The fact that our production was 82 peregrines with 327 birds is based upon the fact that most of the breeding birds held in captivity by private breeders are immature birds which are really unable to lay, on the average, before age 3 or 4. And the commencement of young generally takes place 1 or 2 years thereafter.

We can reasonably predict 400 to 700 peregrines will be produced by private breeders, based upon the numbers of birds held in captivity at the present date, before the end of this decade for conservation, recreation, science, and breeding thus, again in our view, fulfilling the basic purposes of the raptor exemption of the Endangered Species Act.

Audubon's case to repeal the raptor sales regulations as a threat to wild raptor populations is based upon evidence alleged to be uncovered in operation falcon, namely, the high cost of a peregrine falcon encourages raptor breeders to steal birds from the wild for sales. Not only is there no evidence of this from operation falcon as the only birds sold during the sting operation were sold by the Federal Government and that total was 10, but the actual potential cost is highly exaggerated by Audubon. In fact, it dropped 25 percent in only the second year of sales to \$1,500 on the average for a peregrine falcon which is roughly the cost of a large parrot or macaw in this country.

Furthermore, only two breeders were indicted under operation falcon, both under the old regulations, so that Audubon's contention that the laundering of wild eggs and young into breeding projects as "typical" is totally unfounded.

Audubon also stated that over 100 falcons have been removed from the wild illegally. Mr. Bavin stated 70. I suspect that the 70 peregrines include a large number of birds that were confiscated during the sting on June 29, 1984, that were found without the

numbered nylon tie tack which, at any point in time, about 10 percent of those tie tacks have simply fallen off the birds. So, the Government perpetuated an inadequate system of marking these birds.

Audubon also states that this problem is pervasive or, I think more appropriately, falconers are crooks or, as stated in *Audubon Action*, "falconry, the sport of kings, has become the hobby of felons." We resent these insinuations as the vast majority of falconers are law-abiding citizens. We commend the Fish and Wildlife Service for helping purge our ranks of certain lawbreakers, but this is no reason to invoke punitive action against the entire falconry community.

In summary, there are two points which appear very clear from Operation Falcon. No meaningful commercial market existed for raptors in the United States except the market created by the Federal Government. No. 2, the new propagation regulation, with its revolutionary tamper proof seamless marking system and the stringent reporting and recordkeeping, was not involved in any illegal activities during or after Operation Falcon to the present date.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Berry follows:]

PREPARED STATEMENT OF ROBERT B. BERRY, PRESIDENT, NORTH AMERICAN RAPTOR BREEDERS' ASSOCIATION

Mr. Chairman and members of the Committee, I am Robert B. Berry, an insurance executive with offices in Sheridan, Wyoming, and King of Prussia, Pennsylvania. I have been a falconer for nearly 40 years and have pioneered in falcon breeding in the U.S. I am here today as President of the North American Raptor Breeders' Association, a non-profit trade organization established to represent the interests of falcon breeders in North America. We greatly appreciate the opportunity to present testimony and request that our statement be printed in the proceedings of these hearings.

THE ENDANGERED SPECIES ACT EXEMPTION

The North American Raptor Breeders' Association strongly supports the currently existing raptor "exemption" of 1978 to the Endangered Species Act of 1973, as amended. The ESA, along with the Federal Falconry Regulations of 1976 and the Raptor Propagation Regulations of 1983 provide the flexibility both to satisfy the legitimate public needs and to safeguard wild raptor populations, including endangered species. The regulations implementing the raptor exemption establish uniform standards and procedures for the use of qualifying exempt raptors in the sport of falconry and in captive propagation, including the purchase and sale of domestically produced raptors. This statement will consider all peregrine sub-species in the United States because of the potential implications of the "look alike" clause in the Migratory Bird Treaty Act.

SIGNIFICANCE OF PRIVATE PEREGRINE FALCON PRODUCTION

In its statements before the House and Senate Subcommittees, Audubon has called for the repeal of the raptor exemption because in its view, the private peregrine breeders have not fulfilled their responsibility under the exemption. Nothing could be further from the truth. Quoting from the legislative history of the Amendment, the purposes of the exemption are threefold: to "*alleviate some of the human pressures on wild raptor populations * * * increase genetic diversity in captive populations * * * and further encourage captive production of raptors for conservation, recreation, scientific and breeding purposes*" [H. Conf. Rept. No. 95-1084 at 23 (95th Cong. 2nd Sess. 1978)].

Encourage captive production of raptors for conservation, recreation, scientific and breeding purposes

Table I below provides a clear picture of the magnitude and trends in the numbers of private peregrine propagators in the U.S. and their current and estimated

production potential.

TABLE I

Year	Numbers of propagators	Peregrine falcons held for breeding	Progeny produced
1981 ¹	20	90	46
1982 ²			
1983 ³	43	129	67
1984 ³	63	167	84
1985 ⁴	89	327	81 at 6/30
1989 ⁵	150-250	384-691	307-512

¹ Fish and Wildlife Service Final Environmental Assessment—Proposed Rule Making—Raptor Propagation Permits, 50CFR 21.30.

² No data available.

³ An estimate based on figures supplied by established propagators.

⁴ 1985 private peregrine breeding survey.

⁵ An educated guesstimate which assumes a saturation level in the numbers of persons interested in raptor propagation, that a majority of the 200+ propagators will secure peregrines for breeding once they are readily available, and that as breeding stock reaches sexual maturity and propagators gain practical experience, a rough parity will be achieved between numbers of breeders held and progeny produced.

The raptor exemption of 1978 was implemented by the raptor propagation regulations in August of 1983 and achieved limited operational status in the spring of 1984. Nevertheless, in anticipation of the new regulations, significant numbers of falconers applied for interim special purpose raptor breeding permits and began to acquire breedings stock mainly from Canadian sources where sales were permitted. The number of licenses peregrine breeders increased over 400% during this 4-year period.

The number of peregrines in captivity held for breeding increased from 90 to 338 or nearly 400% and 81 progeny have been produced to date with 8 unhatched fertile eggs at June 30, 1985. There are now more peregrines in private breeding programs in the U.S. than held by institutional breeders, a direct result of the propagation regulations which enable cost recovery through direct sales, expense deductions and depreciation of related capital assets. Of even greater significance is the 338 eggs laid by these peregrines in 1985, which is our best measure of future production. Consistent with the experience of the Peregrine Fund in its formative years in the 1970's, it is reasonable to predict substantial increases in production as birds currently held for breeding reach sexual maturity and individual breeders gain practical experience.

In 1984 21 peregrines or their eggs were donated or sold for conservation purposes by private breeders in the U.S., which is 25% of the total U.S. production, plus and additional 12 peregrines from private Canadian sources, or a grand total of 33 birds made available for conservation purposes by private breeders in North America. In 1985 21 peregrines have already been donated or sold to conservation agencies. The Peregrine Fund produced 273 peregrines in 1984 and over 300 in 1985, most of which will be released. Inasmuch as a significant number of the Fund's breeding stock was donated by falconer, private propagators are far behind the Fund in both production and birds earmarked for conservation, but considering 1984-1985 as the initial operational years under the exemption, private breeders can be proud of their accomplishments. We estimate that over half the private peregrine production in the past two years has gone directly into breeding programs, with half of the balance added after a year lost to the wild or end up in captive breeding programs, bolstering both the wild and captive populations.

Increase genetic diversity in captive populations

The second Congressional objective for the exemption, to "increase genetic diversity in captive populations" has been addressed by the North American Peregrine Foundation, Inc., which has funded an International Raptor Registration, maintaining and disseminating computer processed pedigree records similar to the Thoroughbred Racing Association or the American Field's Field Dog Stud Book. Certificates and data retrieval services are furnished to breeders or falconers free of charge to help guarantee the genetic integrity of a viable captive peregrine population (copy of Registration Certificate and sample data retrieval attached.)

Alleviate some of the human pressures on wild raptor populations

Fourteen states have now fully adopted the sales provisions of the new propagation regulations and several additional states permit purchase but not sale.

The new regulations have encouraged established propagators to maximum production and to exchange valuable breeding stock. The increased numbers of captive-bred peregrines, along with improved federal and state laws, are expected to reduce both the need for and the temptation to harvest wild peregrines illegally and to remove the threat of a potential black market.

The will of Congress as expressed in the exemption is entirely compatible with the goals of private peregrine breeders and the exemption in its present form is viewed as a valuable conservation aid to protect and perpetuate all peregrine falcons.

Market prices of peregrine falcons

Notwithstanding the prices quoted by the media and protectionist groups of \$10,000 or more for a peregrine falcon, the actual prices of domestically produced peregrines legally sold to U.S. citizens in 1983 and 1984 were modest by comparison and were roughly equivalent to the current cost of a large parrot or macaw. Table II sets forth the range of prices for peregrine falcons paid by U.S. citizens.

TABLE II

Year	Numbers sold	Low price	High price	Median price
1983 ¹	30	\$1500	\$3000	\$2000
1984 ²	44	400	3000	2000
1985 ³	(⁴)	1000	2000	1500

¹ A single Canadian breeder, prices in Canadian dollars.

² Four U.S. breeders sold 26 peregrines; balance supplied by a Canadian breeder.

³ Estimate based on preliminary reports.

⁴ Not yet tabulated.

Prior to 1984, a single Canadian breeder maintained a monopoly in peregrine sales in the U.S. marketplace. In 1984, for additional U.S. breeders entered the marketplace. Prices are expected to drop in this decade to between \$500 and \$1,000 for a peregrine, which is the cost of production, excluding capital cost recovery. Many propagators are hobby breeders who are interested only in defraying or recovering operating costs.

Foreign sales

In a document prepared by Traffic (U.S.A) on March 14, 1985, only 135 peregrines entered legal trade between 87 CITES countries between 1980-83, compared to over 800,000 "pet" birds imported into the U.S. in 1983. And these figures include imports of peregrines for conservation as well as duplications so that international trade must be considered minimal. Prices of peregrines in the foreign market are impossible to document definitively because none have been sold by U.S. falconers, presumably because there is little demand. In a letter dated 28 March 1983, Dr. David Remple, formerly of Laramie, Wyoming, and now a falcon veterinarian for the Royal Family in the Arabian Gulf State of Dubai, writes in response to my inquiry on prices, "Regarding peregrines—again there is no use for captive-bred birds. Why should there be when wild peregrines abound here? As I was driving back from lunch I saw two brown peregrines stooping on the pigeons that roost on our apartment building." Peter Whitehead, Director of the Alfaisal Falcon Center in Saudi Arabia, writes on 24 March 1985, "The Saudis don't like peregrines, except the Crown Prince and Prince Migrin of Hail, and they get genuine passage Callidus."

Letters abound¹ from knowledgeable people abroad which theorize prices paid for extraordinary falcons, which are pure conjecture or as Dr. Remple says, "I hear through the grapevine." We do have hard numbers on 15 hybrid peregrine/gyrfalcon sold in Saudi Arabia and Bahrain for \$4,000 and \$4,100 per bird in 1984. These hybrids exhibit the best qualities of both the peregrine and the gyrfalcon and should command a price equal to or greater than the price of the pure species for Arabian falconry. Considering the Substantial costs of maintaining, training and exporting falcons for overseas sales, this potential market may not be economically feasible. Nevertheless, overseas sales should be continued because of the potential indirect benefits to wild raptor populations engendered by the substitution of captive-bred birds. Captive-produced birds, through the development of extensive hacking tech-

¹ Appendix A, Commercial Value of Raptors compiled by J.L. Ruda, USFWS

niques, may one day be accepted by Mideast falconers as the equals to their wild counterparts, thereby defusing any existing black market operations. It is also critically important to maintain trade between the U.S. and Canada to create needed genetic diversity and as a source of captive-bred falcons to subsidize release programs.

STATUS OF RAPTOR PROPAGATION REGULATIONS

The Federal Raptor Propagation Regulations of 1983, which implement provisions of the ESA Exemption, have been adopted in 14 states (Colorado, Georgia, Idaho, Iowa, Kentucky, Maryland, Louisiana, Missouri, Nevada, Oregon, Utah, Virginia, Washington and Wyoming). Several additional states allow purchase but not sales (California, Oklahoma, Minnesota and Montana), and at least one state has authorized sale for conservation purposes (South Dakota).

BENEFITS OF EXISTING FEDERAL AND STATE REGULATIONS UNDER THE EXEMPTION

Legal sales of domestically produced exempt and non-endangered peregrines clearly benefit the species both in captivity and the wild. Table I illustrates the significant impact of the new propagation regulations, on both the number of private propagators and peregrine falcons produced. Production is expected to increase dramatically as currently held breeding stock reaches sexual maturity and as new propagators gain practical experience. Given the numbers of variables affecting successful peregrine production, accurate estimates are subject to error, hence the range of figures for projected production in the 1989 year is Table I. Nevertheless, even if we assume the worst possible scenario and select our lowest production estimate of 307 birds, the numbers of peregrines being produced by private propagators at the end of this decade will exceed the annual production of the species in the wild East of the Mississippi River prior to the widespread use of DDT in the 1940's.

The currently existing regulations are expected to produce the following benefits to domestic and wild peregrine falcon populations.

1. Benefits to *domestic* peregrine populations include:

- a. an increase in the number of birds held for captive propagation, because sales will make additional birds more affordable and because the prohibition against using falconry birds in captive propagation has been repealed; and
- b. an increase in genetic diversity, previously discouraged because there was no incentive to exchange valuable breeding stock (monitored by the North American Peregrine Foundation's International Raptor Registration Program), and
- c. increasing numbers of propagators will reduce the threat of a catastrophic loss to an individual peregrine subspecies resulting from fire, wind-storm, disease or other peril.

2. Benefits to *wild* peregrine populations include:

- a. a decrease in potential human pressures of scientific, educational and recreational uses because:

- (i) sales will encourage additional domestic production making more domestic birds available;
- (ii) illegal laundering of birds from the wild will decrease when legal sources become available at competitive prices;
- (iii) black market operations will disappear when forced to compete with legitimate operations at competitive prices; and
- (iv) falconry ethics against the taking and sale of wild birds, which may be compromised when other legal avenues are not available, will be promoted by propagators and falconers alike.

- b. an increase in the numbers of peregrines accidentally lost to the wild from the falconry community, estimated at up to 10% each year. The 2200+ U.S. falconers are currently holding a variety of long-winged falcons estimated at 800 to 1,000 birds, including peregrine falcons. As the premier species for classical falconry, a majority of long-wing falconers will choose a peregrine when available, so that unintentional releases will be substantial in future years; and

- c. a decentralization of captive propagation facilities will prevent the possibility of catastrophic loss resulting from a fire, wind-storm, disease or other peril. In September of 1984, Patuxent Wildlife Research Center lost 20% of the entire captive whooping crane population from Eastern equine encephalomyelitis, a fast-acting viral disease transmitted by mosquitoes. It is unwise to place all of our eggs in one basket; and

- d. the creation of a reservoir population of peregrine subspecies which may be tapped for conservation purposes. The Peregrine Fund will not subsidize the

peregrine indefinitely, nor can the Fund be expected to maintain representative gene pools of the various peregrine subspecies once the recovery phase of reintroduction is completed; and

e. an increase in the numbers of peregrine falcons available to state conservation agencies for reintroduction (the Minnesota Peregrine Project has released 27 peregrines in the past 3 years and expects to release up to 30 birds in 1985. The Missouri Raptor Propagation and Rehabilitation Project and the Illinois Peregrine Project hope to commence peregrine release work in 1985. All of these programs are dependent upon private propagators for their birds.).

OPERATION FALCON AND THE PROPAGATION REGULATIONS

The federal "sting" entitled "Operation Falcon" has delayed adoption of the new propagation regulations even though these regulations have not yet been involved in any indictments, or implicated in any affidavits for search or seizure, or in any of the government informant's notes.¹ In fact, the new regulations were designed to alleviate the need for sting-type operations by providing a legal source of birds to the falconry community not otherwise available. Nevertheless, many state governments have delayed adoption of these regulations because of the continuing nature of Operation Falcon.

In our opinion, sting operations like Operation Falcon are only able to proliferate in an artificially regulated climate which unduly restricts or prohibits free market mechanisms. It is not altogether inappropriate to compare the intolerable legal climate which existed during the days of alcohol prohibition with the dilemma faced by the falconry community when the ESA of 1973 prohibited access to the wild peregrine which has been considered the premier bird for classical falconry for centuries. The raptor exemption of 1978 and the new raptor propagation regulations of 1983 were designed to solve this dilemma, by permitting falconers and propagators access to endangered peregrine falcons held in captivity before November 10, 1978.

USFWS REVIEW OF FALCONRY AND PROPAGATION REGULATIONS

The NARBA has made several recommendations to the Service in its initial comment period ending June 4, 1985, to improve the existing raptor propagation regulations including:

1. More stringent reporting for sensitive species like the peregrine, e.g., report onset of incubation for each clutch rather than first egg, so that eyasses must be marked 45-47 days thereafter, rendering "laundering" virtually impossible.
2. The designation of maximum band sizes reducing the optimum age of marking to between 7 and 10 days.
3. Requiring a photograph of the dorsal scale pattern (an indelible footprint) of the bird's foot along with the band number, providing a permanent record for sensitive species.
4. The development of blood sampling techniques to disprove parentage absolutely, now 10-20% of cases feasible with 50% feasibility projected by year end 1985 and 90% within 5 years. USFWS has used this system successfully and even the threat of this technology is a powerful deterrent to illegal "laundering" of wild birds.

FALLACIES IN THE AUDUBON VIEW

In its Statement to the Service on REG. 21-02-13 dated June 4, 1985, the National Audubon Society demands the repeal of the sales provision in the new raptor propagation regulations because, in its view, Operation Falcon "demonstrates that com-

¹ Statements to the contrary by Audubon in its Statement of HR 1027, before the House Subcommittee on Fisheries and Wildlife appear to be based on a *misunderstanding* of the Service's raptor marking system. Audubon acknowledges two types of marker when, in fact, there are three. The confusion has apparently arisen because the Justice Department in its indictments refers to markers as "non-reusable federal raptor markers", color coded black for wild-taken birds or yellow for captive-bred. Audubon has assumed this yellow non-reusable federal marker was the new yellow seamless marker, when, in fact, it was the old style yellow flexible nylon marker that could easily be manipulated by unscrupulous individuals. *Because of this critically important invalid basic premise, many of Audubon's figures as respects the raptor propagation community are incorrect and hence its conclusions are unjustified.* The new yellow seamless marker, appropriately characterized by the Service as "tamper proof" came into existence in the spring of 1984 and overlapped the 3½-year covert phase of Operation Falcon by little more than a month. That this new and vastly improved marking system, along with its stringent reporting and record keeping requirements, is involved at all in Operation Falcon, is unlikely.

mercialization poses a serious threat to wild raptor populations." Audubon attempts to justify this false premise by innuendo, false and exaggerated claims and by attributing Canadian experience to the U.S. Specifically, Audubon makes the following claims:

1. *Wild peregrines and gyrfalcons demand enormous prices on the black market of up to \$10,000 for a peregrine and \$100,000 for a gyrfalcon.*—We have never advocated the sale of wild birds. We condone only the sale of domestically bred raptors—quasi wildlife—similar to the sales of game birds, waterfowl, fish and fur bearers long the subject of commercialism in this country and with positive effects on wild populations. Other than so-called "evidence" from the press, the rumor mill or the grapevine, we can find no substantive evidence to confirm the above prices (see Appendix A for USFWS raptor prices dated September 29, 1983).

It is interesting to note that of 15 *wild* gyrfalcons provided by the government to U.S. falconers in Operation Falcon, only 3 were sold for an average of \$900 each. Buyers were apparently not available for birds with an alleged value between \$30,000 and \$100,000 (see Appendix E and Appendix B entitled, "Analysis of Indictments and Rule 11 Statements for Captive Breeding Significance" dated 5/2/85).

NARBA hard data of \$1500–\$2000 for a peregrine in the U.S. and \$4000–\$4100 for a hybrid peregrine/gyrfalcon in the Arabian Gulf (data supplied to me by U.S. breeders) refutes Audubon's prices. If an international black market does exist for raptors, it will be effectively defused by the combined efforts of law enforcement and an influx of captive-bred legally acquired falcons as an alternate source to wild birds.

2. *Audubon writes that FWS has publicly stated that it has gathered evidence of over 100 peregrines illegally taken from the wild during the course of the Operation and over 30 gyrfalcons.*—Further clarification from Susan Recce of Interior confirms that this figure involves Canada and may involve peregrines seized on June 29, 1984, from falconers which had temporarily lost their nylon markers (approximately 10% of these markers are lost and must be replaced annually). A review of our spread sheet entitled, "Wild Peregrines Involved in Operation Falcon" (see Appendix C attached) discloses allegations and convictions involving 42 peregrines which we judge may be credible, and 14 additional allegations which, in our opinion, are not credible, including the sale of 10 peregrines, all sold by the U.S. Government (see Appendix d entitled, "Wild Peregrines Allegedly Sold in the U.S. during Operation Falcon"). None of these alleged illegal activities, therefore, have anything to do with falconers selling peregrines or with the new propagation regulations. Except, of course, with the legal source of high interest falcons existing today, we would expect far fewer alleged infractions.

3. *The problem is pervasive with 50 falconers indicted here and in Canada including 2 of the largest breeders in the U.S. and in Canada.*—Again, the Canadian experience is not germane to the U.S. and should be deleted. No large U.S. breeder has been indicted in the U.S. While these indictments may allege millions of dollars in illegal commerce, no evidence has yet appeared in court to substantiate these claims. We do agree with Audubon that a large number of falconers did break the law, most to secure falcons for personal use not otherwise legally available at that time, and we commend the FWS for citing these lawbreakers and for purging our ranks of several major offenders. Operation Falcon does not, however, warrant punitive action against the entire falconry community by repealing the very regulations which enable the domestic production of peregrine falcons and were designed by the FWS to fulfill the demand for this species for recreation and conservation.

4. *Raptors taken from the wild have typically been taken as eggs or eyasses, and then laundered through breeding facilities to be claimed as captive-bred.*—In his testimony before the Senate Subcommittee, James Leape embellished this statement by adding that the eyasses, were fraudulently marked with the new seamless bands. None of the Operation Falcon cases have involved the new marking and reporting systems. Only 2 breeding projects, one operated by Tom Kresl, Illinois, the other by Wayne Upton, California, involved laundering eggs or eyas birds, in these cases goshawks (see Appendix B attached). There are, however, several instances of illegal use of the old style flexible nylon marker designed for captive-bred birds being applied to fully grown birds. These violations could not have occurred under the new seamless marking system.

Rather than demonstrating the existence of a large commercial market in the U.S. for raptors as claimed by Audubon as justification for repeal of the commercial

sales regulations, Operation Falcon has proved just the opposite. Furthermore, even if we assume the worst possible scenario against the falconry community and consider all 38 peregrines alleged to be involved in illegal activities over a 3½-year period, there is an overwhelming net gain to the wild peregrine population from falconry-related activities as follows:

1. 42 peregrines were directly supplied by propagators for release in 1984 and 1985;
2. an estimated accidental release of between 10 and 20 peregrines each year; and
3. an estimated 75% of the 1400+ peregrines released by The Peregrine Fund were contributed directly by falconers or are the progeny of peregrines contributed by falconers.

Even though the falconry community has demonstrated a very positive impact on wild peregrine populations, the North American Falconers' Association has appropriately addressed this most critical issue in its statement to the Service on REG. 21-02-13, calling for an in depth evaluation of the effects of all falconry-related activities on the wild resource prior to initiation of any change. We have no reason to believe that previously conducted Environmental Assessment Statements for falconry in 1976 and raptor propagation in 1982, which concluded no impact to the resource, have changed.

In our view, the new propagation regulations will be accepted by protectionist groups as a conservation measure to protect and perpetuate wild raptor populations by providing an alternate source of domestically bred birds. Wildlife management philosophies are adapting to the demands of a changing world where philanthropic support of wildlife is inadequate. The continued welfare of a species is closely linked with its utilitarian or economic value—the most successful examples being waterfowl, game birds and game fish. The peregrine is no exception. Its survival is guaranteed not by protectionist groups who may wish to see it proliferate in the wild, but by the falconers who have a vested, selfish interest in both wild and captive populations and are willing to pay the price.

SUMMARY AND CONCLUSION

The decline of the peregrine was caused by reproductive failure due to egg breakage induced by ingestion of DDT contaminated prey. The recovery of the peregrine in the U.S. is occurring because of reduced levels of DDT in the environment and the release of captive produced peregrines. We are unable to find any meaningful biological data which even suggests that the decline of the peregrine was caused by human take or disturbance other than destruction of habitat, or that the recovery of the peregrine is being hindered by this same human interference.

The recovery of the peregrine in the U.S. can logically be divided into three phases. In phase I, we learned how to breed peregrines in captivity in meaningful numbers; in phase II, which continues today, we developed techniques to successfully reestablish viable wild populations of peregrines; and in phase III, we will meet the challenge to maintain a healthy wild peregrine population in a changing world. The Peregrine Fund played the major role in phase I and continues in a leadership position in phase II, supported by a variety of private and public groups. Along with subsidizing state recovery programs which the Peregrine Fund is unable to support in phase II, both the falconry community and the breeders will assume key roles to monitor, assist and whenever necessary, subsidize established peregrine populations in phase III of the peregrine recovery.

The reestablishment of the peregrine into habitats from which it was extirpated because of environmental contamination is considered by many as one of the outstanding conservation achievements of this century. It is essential that both the Raptor Exemption to the Endangered Species Act and the federal falconry regulations remain in tact to guarantee the continued success of this program.

The falconry community has assumed a leadership position in raptor conservation for several decades and has pioneered a variety of programs to help guarantee the survival of all raptorial species, including publicity and public relations to halt raptor persecution, raptor rehabilitation, electrocution abatement, pesticide abatement, captive propagation and reintroduction of threatened and endangered species, to mention a few. Falconers are directly responsible for the strict federal falconry regulations designed to discourage all but the truly dedicated sportsmen. Falconers championed the raptor exemption to the ESA to facilitate reintroduction of the peregrine in the U.S. and to guarantee the existence of a viable captive population should another environmental catastrophe threaten the chemically sensitive wild population. Falconers supported the concept of legal sales of domestically produced

raptors as a means to encourage captive propagation within the framework of existing regulations.

The new raptor propagation regulation evolved over an 8-year period and are the product of a majority of informed expert opinion. They provide stringent safeguards for both captive and wild raptor populations. They establish uniform standards and procedures for engaging in raptor propagation, a "tamperproof" seamless marker and rigid reporting and record keeping requirements. These new regulations have not been involved in any illegal activities uncovered by Operation Falcon.

They are, in fact, a conservation measure designed by the Service to help alleviate the temptation for persons to engage in illegal activities by encouraging the production of a legal source of domestically bred raptors not heretofore available to most U.S. falconers. Despite claims to the contrary, based on an emotional bias against maintaining quasi-wildlife in captivity and hunting sports, these regulations, given the continued support of the Service, will achieve our goals to protect and perpetuate captive and wild raptor populations indefinitely.

Our existing raptor laws are not perfect and will continue to evolve over time as new data is gathered. Nevertheless, we have a firm base upon which to develop model laws where the legitimate rights of our citizens complement biological parameters insuring the survival of wild ecosystems. The falconry community has demonstrated its dedication, commitment and competence to justify its stewardship role as a major benefactor to our raptor resource. We respectfully request the continued support of the Congress to help us fulfill this obligation.

On behalf of the North American Raptor Breeders' Association, I would like to thank the Chairman and members of the Subcommittee for your kind attention and consideration of our views.

PAGE 1

APR 15, 1985 9:30:19 RAPTOR LIST

MAPP 0 121 REGISTRATION MARKER 0 R0084202 TYPE USFWS COLOR YELLOW FEMALE
 GIVEN NAME BLU SPECIES COMMON WYOMING BREEDING METHOD ARTIFICIAL
 SPECIES SCIENTIFIC PEALE'S X PRAIRIE MATCHING METHOD UNKNOWN
 GEOGRAPHIC ORIGIN WASHINGTON REARING METHOD HAND
 REMARKS DATE HATCHED 5/05/80

PAST REGISTRATION MARKER 01 92
 REGISTERED TO DENNIS CHANCELLARE
 ADDRESS P. O. BOX 105
 ADDRESS ALBUQUERQUE, NM 87103
 ADDRESS ZIP 99102 PHONE 509-332-1680
 ADDRESS ZIP 99143 PHONE 509-332-3109

PAGE 1

APR 15, 1985 9:31:50 RAPTOR LIST

MAPP 0 127 REGISTRATION MARKER 0 R0026142 TYPE USFWS COLOR YELLOW MALE
 GIVEN NAME RENO SPECIES COMMON PEREGRINE FALCON BREEDING METHOD NATURAL
 SPECIES SCIENTIFIC FALCON PEREGRINUS FEMALE MATCHING METHOD UNKNOWN
 GEOGRAPHIC ORIGIN QUEEN CHARLOTTE REARING METHOD UNKNOWN
 REMARKS DATE HATCHED 1978

PAST REGISTRATION MARKER 01 92
 REGISTERED TO LESTER BOYS
 ADDRESS R.R. BOX 841
 ADDRESS PULLMAN, WA
 ADDRESS ZIP 99143 PHONE 509-332-3109
 ADDRESS ZIP 99510 PHONE 702-764-8854

PAGE 1

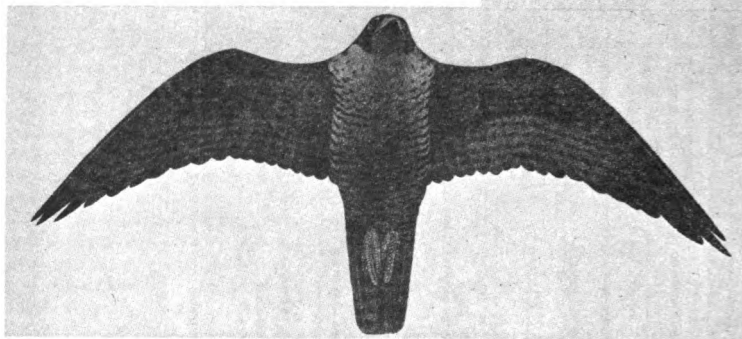
APR 15, 1985 9:32:00 RAPTOR LIST

MAPP 0 121 REGISTRATION MARKER 0 R0094214 TYPE USFWS COLOR BLACK FEMALE
 GIVEN NAME OLSEN'S SPECIES COMMON PRAIRIE FALCON BREEDING METHOD NATURAL
 SPECIES SCIENTIFIC FALCO MEXICANUS MATCHING METHOD PARENTS FULL TERM
 GEOGRAPHIC ORIGIN WASHINGTON REARING METHOD HAND
 REMARKS DATE HATCHED 5/05/72

PAST REGISTRATION MARKER 01 92
 REGISTERED TO LESTER BOYS
 ADDRESS R.R. BOX 841
 ADDRESS PULLMAN, WA
 ADDRESS ZIP 99143 PHONE 509-332-3109
 ADDRESS ZIP 99510 PHONE 702-764-8854

International Raptor Registration

N.A.P.F. FILE NO. _____
 GIVEN NAME _____
 SPECIES (SUBSPECIES): _____
 REGISTRATION MARKER NO. _____
 REGISTERED TO: _____
 ADDRESS: _____
 CITY & STATE _____
 ZIP _____
 PHONE: _____
 DATE: _____



APPLICATION FOR TRANSFER OF REGISTRATION

TRANSFERRED TO:
 NAME: _____
 ADDRESS: _____
 CITY & STATE _____
 ZIP: _____
 PHONE: _____

DATE TRANSFERRED: _____

NOTE ANY INFORMATION PERTAINING TO TRANSFER, ALSO CHANGES SUCH AS A NEW MARKER NO., ETC.

SEND COMPLETED FORM TO:
 THE NORTH AMERICAN PEREGRINE
 FOUNDATION, INC.
 540 N. THIRD STREET
 PHILADELPHIA, PA 19123
 215/ 637-5400

APPENDIX A

Commercial Value of Raptors of High Falconry Interest - 1980-1983^{1/}

Captive Bred?	Sex	Condition	Country of Origin	Selling Price US\$\$		Note	Source
				In Country	In Arabia		
<u>PEREGRINE FALCON</u>							
Yes	M	Ordinary	Canada (BC)	1,200	n.a.	a	Marcus 7-8-82
Yes	F	Ordinary	Canada (BC)	2,400	n.a.	a	Marcus 7-8-82
Yes	M	Screamer	Canada (BC)	600	0	b	Harsingh 6-9-83
Yes	F	Screamer	Canada (BC)	1,200	0	b	Harsingh 6-9-83
Yes	F	Exceptional	Canada (BC)	n.a.	5,000	b	Harsingh 6-9-83
Yes?	M	Ordinary	U.K.	1,800	n.a.	-	Robinson 9-25-81
Yes?	F	Ordinary	U.K.	3,600	n.a.	-	Robinson 9-25-81
Yes	-	Ordinary	U.K.	750	n.a.	c	Fox 8-16-83
Yes	-	Ordinary	U.K.	400	n.a.	d	Thacker 8-26-83
-	-	Ordinary	W. Germany	690	n.a.	e	Roben 4-30-80
-	-	Exceptional	W. Germany	2,250	13,900	e	Roben 4-30-80
Yes	M	Ordinary	W. Germany	1,500	n.a.	-	Cade 6-14-82
Yes	F	Ordinary	W. Germany	3,000	n.a.	-	Cade 6-14-82
Yes	F	Exceptional	W. Germany	5,000	n.a.	-	Cade 6-14-82
Yes	-	Ordinary	W. Germany	< 500	n.a.	f	Schormair 11-23-82
No	F	Ordinary	Mexico	n.a.	2,500	g	Harsingh 6-9-83
No	F	Exceptional	Pakistan	n.a.	<13,000	h	Platt 1-3-83
No	F	Ordinary	Pakistan	n.a.	< 800	i	Schwartz 1-17-83
No	F	Damaged	Pakistan	n.a.	0	j	Schwartz 1-17-83
No	F	Exceptional	Pakistan	n.a.	10,000	k	Schwartz 1-17-83
<u>GYRFALCON</u>							
No	-	Ordinary	Canada (YKT)	1,275	n.a.	l	Mossop 2-17-81
Yes	-	Ordinary	Canada (YKT)	n.a.	12,000	m	Mossop 2-17-81
Yes	M	Ordinary	Canada (YKT)	n.a.	6,000	n	Graham 6-25-82
Yes	F	Ordinary	Canada (YKT)	n.a.	12,000	n	Graham 6-25-82
No	-	Ordinary	Canada (NWT)	n.a.	9,800	o	Harsingh 2-23-83
<u>SAKER FALCON</u>							
No	F	Exceptional	n.a.	n.a.	<13,000	p	Platt 1-3-83
No	F	Ordinary	Pakistan	n.a.	< 400	q	Schwartz 1-17-83
No	F	Damaged	Pakistan	n.a.	0	q	Schwartz 1-17-83
No	F	Exceptional	Pakistan	n.a.	< 7,000	q	Schwartz 1-17-83
No	F	Exceptional	Syria	n.a.	7,000	-	Harsingh 6-9-83
<u>HARRIS' HAWK</u>							
Yes	-	Ordinary	U.S./ Mexico	n.a.	1,000	r	Thacker 8-26-83
<u>GOSHAWK</u>							
No	-	Exceptional	Canada (YKT)	290	n.a.	s	Mossop 11-3-80

^{1/} Information not to be used without accompanying notes. Figures based upon personal communications with persons having first or second hand knowledge of recent transactions. U.S. \$\$ based on approximate foreign currency exchange rates at the time.

APPENDIX A

Commercial Value of Raptors of High Falconry Interest - 1980-1983 (continued)Notes

- ^a Based on *F. p. tundrius*. Noncompetitive price as only 1 major commercial dealer in N.A. Price per pair ca. \$3200. Birds with behavioral or physical defects are heavily discounted (Mesch 9-28-83).
- ^b Falcons other than perfect, exceptionally large females have little value to Arab falconers. Exported falcons must be partially trained.
- ^c Good untrained falconry stock.
- ^d Generally accepted price for disposal of surplus stocks among falconers.
- ^e Based on one-half of pair price.
- ^f Generally no profit between propagators and falconers. Considered contribution to expenses of propagation.
- ^g Not sale per se; rather an estimate of procurement cost.
- ^h Price paid for "very best bird" was \$5420 (1981) and \$13,000 (1982). Not average price.
- ⁱ Based on relative value of Saker Falcon.
- ^j "...a broken feather or the wrong color of feathers can make an otherwise good bird, worthless."
- ^k Top dollar is paid only for the proper bird in the proper season.
- ^l Cost of government collecting and export permit.
- ^m Recognized as a "thin market" at this price by government.
- ⁿ Presumed by compiler to be export sale.
- ^o 1982 price including \$5000 Can. permit. 1983 price anticipated to be \$7000.
- ^p See note "h".
- ^q Falcons of wrong color can be purchased at end of season for \$250 to \$400 or can be considered worthless.
- ^r 1982 price. 1983 prices anticipated to be about \$800. Fox (5/83 Jour. British Falconers' Club) stated "...Harris Hawk is now priced almost twice as high as a Peregrine."
- ^s Government price estimated for removal of birds causing depredation and for export permit fee. Unknown whether or not program implemented, nor has the cost been verified. Exceptional because of extreme large size of birds in that population.

Compiled by J. L. Ruos
September 29, 1983

APPENDIX B

[illegible]

APPENDIX B

[illegible]

[illegible]

APPENDIX C
JULY 9, 1985

July 9, 1985

APPENDIX C

Digitized by Google

Original from
UNIVERSITY OF MICHIGAN

[illegible]

APPENDIX E

INABILITY OF THE STING TO GET AMERICANS TO BUY GYRFALCONS

Even though the gyrfalcon is the most glamorous and impressive of all falconry birds, the sting was able to get so few Americans to buy wild gyrfalcons that its agent, McPartlin, had to give away most of those he did not sell to the German and Canadian trading rings. The following compares the cases where he gave gyrfalcons to falconers to entice them to manipulate bands and records with the cases where he actually sold them:

INDICTMENT NO.	SPECIES	NUMBER GIVEN TO AMERICANS	
84-41-GF	Gyrfalcon	1	Falconer gave McPartlin 1 peregrine, received 1 gyr & 1 peregrine for a net of 1 gyrfalcon.
84-44-GF	Gyrfalcon	2	
84-49-GF	Gyrfalcon	2	
84-47-GF	Gyrfalcon	1	
84-46-GF	Gyrfalcon	2	
84-45-GF	Gyrfalcon	1	
84-CR-189	Gyrfalcon	2	
84-CR-190	Gyrfalcon	<u>2</u>	
Total gyrfalcons given away to Americans		13	

GYRFALCONS SOLD
TO AMERICANS

		<u>Number</u>	<u>Price</u>
DR-84-GF:			
Defendant 1	Gyrfalcon	1	\$600
Defendant 2	Gyrfalcon	1	\$600
Affidavit	Gyrfalcon	<u>1</u>	<u>\$1500</u>
#84-0099H-01			
Western Dist.		Total sold	3
of Missouri			\$2700
Average price paid by American falconers			\$900

The average price of \$900 for the three birds paid by Americans can be compared with the average of \$5700 each paid by the German Ciesielski family (19 gyrfalcons for \$112,000). Price paid by the Canadian trafficker Luckman was about \$5000 - he traded two peregrines and \$5000 for three gyrfalcons.

Mr. BREAUX. Thank you. We will reserve our questions until the end.

Dr. Cade.

STATEMENT OF DR. TOM CADE, PROFESSOR OF ORNITHOLOGY, CORNELL UNIVERSITY, AND PRESIDENT, THE PEREGRINE FUND, INC.

Dr. CADE. Thank you very much, Mr. Chairman, and thank you for allowing me to appear here today, especially since I feel that I am perhaps considered a *persona non grata* in some parts of this town these days. The folks down in the Interior Department say they have been told not to talk to me, so that is one of the reasons why there is a lack of communication back and forth these days. So, I am particularly pleased to be invited up to the Hill to talk with this subcommittee.

I think it might be well to begin with the good news about the peregrine falcon before we hear the bad news which I am sure the Audubon people will cover in detail. The good news is that the peregrine falcon is on the increase in nearly all parts of its worldwide range in which it was on the decline back in the 1950's and 1960's and early 1970's owing to the effects of DDT on its reproduction.

My wife and I just returned from a short Fourth of July vacation. We took a trip up into the Adirondack Mountains in New York, the Green Mountains, and the White Mountains of Vermont and New Hampshire. We had the rare privilege and, for me, a great thrill to see the fledging of young peregrine falcons at four historical eyries on cliffs in these mountains. This is the first summer in more than 30 years that such a trip has been possible. Now, these 4 are just a part of 25 nesting pairs that we know about this year in the East, from Virginia north to Quebec, owing to the work which the Peregrine Fund and a great many of our co-operators have done since 1975 to release more than 600 captive produced peregrines into the wild.

And the species is on the increase elsewhere in the United States and other parts of North America. The recovery of the species in parts of Europe has been especially dramatic, particularly in Great Britain where there are now estimated to be more than 1,000 pairs of peregrine falcons nesting every year despite the fact that more than 50 nests get robbed each year.

I have provided some further details of population estimates in my written statement, Mr. Chairman, which I would like to direct your attention to but will not dwell on here. I would just like to summarize this part by saying that right now today there are more peregrine falcons nesting in the wild than at any time in the last 30 years.

Now, you don't have to take my word only for these figures, Mr. Chairman. Each breeding record and each population estimate can be independently confirmed by one or more State or Federal biologists or other professional colleagues who work with us, and I have listed some of them for you, too, Mr. Chairman, in my written statement.

I emphasize this fact because, as you know, the FWS Division of Law Enforcement document which was referred to earlier and

which has been widely distributed contains accusations about the Peregrine Fund based on hearsay and slander. One of these accusations is that we engage in deliberate manipulation of peregrine population estimates. So, I just want to reassure this subcommittee that the figures that I have provided in my statement can be independently verified by people who are not directly associated with the Peregrine Fund.

Contrary to what the Audubon people have been saying and will probably say today, taking, in the legal sense in which it is defined, taking, whether it is legal or whether it is illegal, is not a threat to the continued existence of wild populations of peregrine falcons. There is no basis in biological fact for this idea, and it is not a valid reason for demanding more rigorous rules or controls or for shutting off legal commerce in domesticated peregrine falcons as a way to stop the laundering of wild eggs and young through breeding projects.

In the first place, laundering is probably not the main way that peregrines are being taken illegally from the wild if you consider North America as a whole. Most of them are still being trapped as migrants in places like Mexico and farther south.

Now, there are plenty of good reasons for all of us to be outraged by the illegal take of peregrines. Falconers are just as outraged as conservationists about this, but a threat to the continued existence of wild populations, a pet phrase of the National Audubon Society, is not one of these reasons.

This idea is based, in part, on grossly exaggerated estimates of the numbers taken illegally—I still believe that the numbers we have heard today are probably exaggerated—especially in the United States, and that is what our laws are primarily concerned about, U.S. citizens, not what Canadians or Germans and Austrians and Arabs do. And it is also owing, in part, to a refusal to acknowledge the real numerical status of wild populations in the 1980's.

People who are inclined to break the law, Mr. Chairman, will find a way, despite the most exquisite statutory or regulatory language that Mr. Eno or Mr. Leape could devise to prevent it. The few people who find it profitable to steal eggs or young from the wild nests will continue to find ways to do so even if we make it illegal to buy or sell domesticated peregrines or even if we abolish captive breeding altogether.

The way to reduce this unacceptable behavior to a minimum—and that is all we can expect. There is no such thing as a foolproof law. There is no such thing as a foolproof band. Let's face it. We try to do the best we can with the laws we have and cut violations to a minimum, but we are not going to stop all illegal acts. You know, it is ridiculous to think about that.

The way to cut poaching down to a minimum is not to deprive falconers and raptor breeders of their particular version of the pursuit of happiness in a futile attempt to make it more difficult for a few dishonest individuals to break the law. Rather, it is to devise more effective methods for enforcing the laws that already exist. I was very pleased to hear Mr. Lambertson agree with that and to suggest that the Fish and Wildlife Service is thinking about other things than ineffective scams for doing so.

In short, to conclude my part, we need better law enforcement. I agree entirely with that. We don't have adequate law enforcement, in my opinion, for several reasons which I don't have time to go into here but I have stated elsewhere. The most important reason, however, has been alluded to already, and that is because law enforcement people in the Fish and Wildlife Service cannot or, at least, they will not distinguish the good guys from the bad guys. So, they consider all of us bad guys.

That means that they spend an awful lot of their time and an awful lot of the taxpayers' money investigating people who haven't done anything wrong. The Peregrine Fund, for example, has been under investigation more or less continually for at least 10 years, and it would be extremely interesting for me and I think perhaps for the people at large to know how much that investigation has cost the Fish and Wildlife Service.

It also means that they end up making the good guys mad at them, and I am mad at them, and I think I have a right to be mad at them. I have some friends in the Law Enforcement Division, and I hate to get mad at them, but I am mad and I don't mind admitting it here.

So, we want to see some changes, and we want to see some changes in the Division of Law Enforcement that will be fundamental with respect to their philosophy and their policies and their modus operandi, changes that will bring the Division back into harmony with the basic conservation and wildlife management objectives of the Fish and Wildlife Service. I think they are disharmonious with respect to the rest of the Service, and, above all, changes which reflect better respect for the constitutional rights of American citizens.

Thank you.

[Prepared statement of Dr. Cade follows:]

PREPARED STATEMENT OF DR. TOM J. CADE, PROFESSOR OF ORNITHOLOGY, CORNELL UNIVERSITY, AND PRESIDENT, THE PEREGRINE FUND, INC., LABORATORY OF ORNITHOLOGY, ITHACA, NY

Mr. Chairman, members of the Subcommittee, I thank you for the opportunity to comment on the "raptor exemption" of the Endangered Species Act as amended in 1978 and on the reasons that have been presented for proposed changes in the wording of that exemption to prohibit the buying and selling of domesticated Peregrine Falcons for use in falconry. I speak for The Peregrine Fund, Inc., a nonprofit, publicly supported organization which operates three regional programs for recovery of the Peregrine Falcon—one for the eastern United States headquartered at Cornell University, one for the Rocky Mountain states located at our newly created World Center for Birds of Prey in Boise, Idaho, and one for the Pacific Coast operated in association with the Predatory Bird Research Group at the University of California, Santa Cruz.

The Peregrine Fund, Inc. maintains the largest collection of captive Peregrines in the world for propagation and release to the out-of-doors. By the end of the 1985 season we will have raised and released more than 1700 Peregrine Falcons since the first releases in 1975. We have also been involved in all other aspects of the North American effort to conserve and to restore this species in nature, including work on pesticide analysis and monitoring, habitat studies, population surveys, manipulating the reproduction of wild pairs, and some field assistance to law enforcement agents in Alaska and Canada.

Our organization works closely with many state and federal agencies, with conservation organizations, and with the community of falconers and private raptor breeders, and we are therefore in a unique position to evaluate the relative merits of opposing views about the raptor exemption and about human activities relating to the

Peregrine Falcon. I am here to urge your Subcommittee to reauthorize the Endangered Species Act without changes.

I would like to make three points, Mr. Chairman, and then elaborate briefly on each one. *First:* The endangered Peregrine Falcon is strongly on the increase in almost all parts of its worldwide range where it has been in decline in the 1950's, 1960's, and 1970's owing to the effects of DDT on its reproductive physiology; and this increase in numbers has been particularly striking since 1980, during the entire period of "Operation Falcon," when so many falcons are supposed to have been taken from the wild. *Second:* The significance of the findings about illegal taking and trafficking in birds of prey, revealed by "Operation Falcon," has been grossly and, I believe, deliberately exaggerated both in respect to the extent of these illegal activities by U.S. citizens and in respect to their impact on wild raptor populations, Peregrine Falcons in particular. *Third:* Effective law enforcement to protect birds of prey depends importantly upon the existence of a high level of confidence between law enforcement officials and the community of law-abiding falconers and raptor breeders, but the behavior of many FWS officials and agents during "Operation Falcon" and subsequently has largely eroded any trust that honest citizens might have had in them and their organization, because these officials and agents have treated all of us with equal contempt and equal suspicion of wrongdoing. Each falconer and raptor breeder is guilty in their eyes unless he can prove absolutely that he is innocent, and so each of us has become an object of surveillance and investigation and, sometimes, of abuse in one form or another.

Mr. Chairman, the Peregrine Falcon as a species is making an encouraging recovery in North America and in Europe as a consequence of both natural and artificial (managed) processes of population increase. Thanks to the release of more than 600 captive produced young in the eastern USA between 1975 and 1984, this breeding season at least 38 established pairs have been seen east of the Mississippi River in a region where no Peregrines are known to have nested from the late 1950's until 1979, when the first of our released falcons laid eggs in New Jersey. Twenty-five of these pairs laid eggs in 1985 and produced 46 young of their own in six eastern states—two in Virginia (Dr. Mitchell Byrd, College of William and Mary); three in Maryland (Gary Taylor, Maryland wildlife department); thirteen in New Jersey (Paul D. McLain, N. J. wildlife department); four in New York State (Peter Nye, N. Y. D. E. C., endangered species unit); one in Vermont (Donna Crossman, Vermont Institute of Natural Sciences); and two in New Hampshire (John Lanier, U. S. Forest Service). This re-established population is doubling in size every two years, and at that rate there should be more than 200 pairs by 1990, and the eastern population would be eligible for removal from the endangered species list.

Peregrines are also on the increase elsewhere in the United States and North America. Some examples are: (1) Colorado, up from only 4 productive pairs in 1974 to at least 15 pairs in 1985 (Gerald Craig, Colorado Division of Wildlife); (2) at least 10 pairs on cliffs in the Big Bend region of Texas and Mexico in 1985 (Steve Hoffman, US, FWS, Region 2); (3) the Colorado Plateau of southern Utah, at least 18 occupied eyries (National Park Service staff); (4) California, about 80 occupied sites in 1985, up from fewer than 20 occupied eyries in the late 1960's and early 1970's (David Harlow, US, FWS, Region 1; Ron Jurek, Calif. Fish and Game); while (5) in the Arctic and boreal regions of Canada and Alaska there are several thousand nesting pairs of Peregrines (Richard Fyfe, *et al.*, *Canadian Field-Nat.* 90(3):228-273, 1976; C. M. White and R. Fyfe, *Canadian Field-Nat.* in press, 1985). These northern populations had recovered to such an extent by the early 1980's that the Office of Endangered Species, FWS, officially down-listed the so-called *tundrius* subspecies from "endangered" to "threatened" (*Federal Register*, Part VII, vol. 49, no. 55, 1984).

Recovery in parts of Europe has been even more dramatic. In Britain there were 783 eyries known to be occupied in 1981 (D. A. Ratcliffe, *Bird Study* 31(1), 1984), and the population has continued to increase, so that the total for the whole of the British Isles is now more than 1,000 pairs—more than are known to have been in existence at any time in this century and about 3 times the number present at the lowest point in the DDT-induced decline in 1962-63. In France there are currently some 550 to 600 occupied eyries (R.-J. Monneret, *Fond's Regional D'Intervention Pour Les Rapaces*), up from a low of around 150 pairs in 1975 (J.-F. Terrasse, ICBP World Conference on Birds of Prey, Vienna, 1975). The Peregrine is also increasing in southwestern Germany, Switzerland, and other parts of central Europe.

You do not have to take my word only for these figures, Mr. Chairman. Each of these breeding records and these population estimates for individual states, countries, or regions can be independently verified by one or more state or federal biologists or other professional colleagues who cooperate with The Peregrine Fund in this work. I emphasize this point for two reasons: First, as you know, the FWS Divi-

sion of Law Enforcement has distributed a document which contains accusations about The Peregrine Fund based on hearsay and slander. One of these accusations is that we engage in deliberate manipulation of Peregrine population estimates, and so I just want to reassure this Subcommittee that the figures I have provided my statement can be independently confirmed by other who are not closely associated with The Peregrine Fund. Second: Repeatability of results and independent verification of original observations and conclusions by others are important principles of scientific method; they are what keep scientists honest and science true.

It would be a fine thing if the same self-correcting principles could apply in other spheres of human behavior in which the distinction between fact and fiction is important. Falconers and raptor breeders would like to see independent verification or at least careful documentation of the figures and generalizations that the FWS Division of Law Enforcement has publicly reported or presumably provided to others about the magnitude of illegal activities by U.S. citizens involving raptors; but we doubt that such verification or documentation will be forthcoming, because we doubt that it can be produced.

To conclude my first main point, Mr. Chairman, there are more Peregrine Falcons nesting in the wild in North America and in Europe today than at any time in the past 30 years, and there are more Peregrines in captivity than ever before, thanks to captive propagation. There is every expectation for a full recovery of the Peregrine Falcon in the United States, if we can just continue for a few more years the courses of action that have been specified in the official recovery plans which have been developed under the authority of the Endangered Species Act, especially as mandated in the 1978 amendments, including the "raptor exemption." No changes in the Act are needed to effect this desirable end.

The reason I have dwelled at some length on these population figures is because the petitions to modify the raptor exemption of the Endangered Species Act and similar arguments to change the falconry and raptor propagation regulations under the Migratory Bird Treaty Act are based on the misperception that the illegal taking of Peregrines and other raptors—but especially of Peregrines—poses a serious threat to the existence of wild populations. This deliberately fostered misperception originates from the hyped newsreleases put out simultaneously by the Departments of Interior and Justice (jointly) and by Amos Eno of the National Audubon Society on 29 June 1984. The Secretary of the Interior and the Attorney General allowed their names to be used to lend authority to statements that are untrue, such as: "Illegal trafficking in protected wildlife has become an enormous problem. A multi-million dollar illegal market is threatening the existence of some species . . ."

This idea that illegal taking and trafficking in Peregrine Falcons constitutes such a significant drain on wild populations as to threaten their continued existence has been a persistent theme in all statements issued in the name of the National Audubon Society, but it has no basis in biological fact. It has been fostered in part by exaggerated claims about the numbers of birds taken from the wild and in part by a refusal to recognize what the actual numerical status of wild populations is. At the same time all this reputed taking from the wild is supposed to have been going on in North America—whether it amounted to 10 birds a year or 100 birds a year—the Peregrines have been on the increase. This fact has been especially clear in Great Britain despite good documentation there that around 50 eyries a year get robbed of their eggs or young. On 15 June 1984, a few days prior to the big announcement of "Operation Falcon," the Fish and Wildlife Service had issued a "Trial Section 7 Consultation" in which it assessed the biological impact of an annual harvest of Arctic Peregrines for falconry and concluded that "an annual take of 60 to 100 first year migrant peregrine falcons for the purpose of falconry, will not jeopardize the continued existence and recovery of the Arctic or American peregrine falcons in North America." This is a number far greater than the documented number taken illegally from the wild during the entire course of "Operation Falcon" and is hardly consistent with their Secretary's notion that thaking from the wild constitutes a significant hazard to the status of the wild populations.

There are no valid grounds—none—to justify more stringent laws or rules to control the behavior of falconers and raptor breeders than presently exist, based on the assumption that their activities constitute an imminent threat to the continued existence of any species—whether it be the Peregrine, the Gyrfalcon, the Red-tailed Hawk, or whatever. There already are more rules to control these two activities in the MBTA regulations than exist for all other permitted activities combined. If you examine 50 CFR 21, Subpart C, which deals with Migratory Bird Permits, you will find that section 21.28 on falconry permits extends for 5 pages; section 21.30 on raptor propagation permits covers another 4 pages; the regulations for all other mi-

gratory bird permits—banding permits, scientific collecting permits, taxidermist permits, waterfowl sale and disposal permits, and special purpose permits—require only 4 pages. To put it mildly, these activities are already over-regulated, and some simplifications are badly needed. Someone needs to apply the Jeffersonian dictum: "That government governs best that governs least." We need to grasp for the freedom expressed in the words of Justice William Douglas—something to be effect that "Fundamental to all human rights is the right to be left alone."

Do not misunderstand my emphasis. No honest falconer or raptor breeder condones the illegal taking of wild raptors or commercial trafficking in these birds—and most of us are honest, Mr. Chairman. Such activities violate the laws of the land, they are esthetically ugly, run counter to the spirit of conservation, and are socially unacceptable. They should be curtailed to the extent practicable without infringing on the legitimate rights of falconers and breeders to pursue their interests. Unfortunately, present law enforcement methods seldom result in the arrest and conviction of the professional poachers and traffickers; and when they are caught, all too often they are allowed to plea-bargain for insignificant penalties which have no deterrent effect and do not serve justice.

The raptor exemption and the questions about commercial sale of domesticated Peregrines are trivial issues which have been blown out of all proportion to their significance with respect to the safety and welfare of wild falcons and other birds of prey. I am amazed that so many grown men have been willing to spend so much valuable time arguing about them.

The real issues of concern to the American people arising from the public furor created by biased newsreleases, rampant disinformation, and the need now to hold Congressional hearings on "Operation Falcon," have more to do with the integrity, honesty, and competence of government officials and how much the American people can trust what these officials say and do. These are the issues I believe this Congress should focus its attention on. Not only have the American people and their elected representatives been seriously misled from the very first announcements about "Operation Falcon," but I believe that the whole philosophy back of such scams is offensive and un-American, if not unconstitutional; and such covert operations need very careful scrutiny by the Congress to make sure the rights of citizens are not being abrogated by bureaucratic authority.

Moreover, the conduct of special agents and undercover informers in carrying out such investigations and stings frequently exceeds acceptable limits of law enforcement and results in abusive actions against citizens who have done nothing wrong and sometimes, also, in illegal actions by the agents themselves. "Operation Falcon" abounds in examples. I will not dwell at length on all types of abuse, as much of this information will be presented by others, but I would like to outline the general picture.

In several instances during "Operation Falcon" agents searched premises without warrants. They confiscated valuable breeding birds from suspects who were never arrested and charged, but they have refused to return the falcons to their owners; in some cases these birds have been seriously injured or have died in the government's hands. At least two defendants—and probably more—were entrapped as later determined by their acquittal in a trial by jury. In the course of their continuing investigations and interviews with third parties, FWS agents have frequently maligned suspects for whom they have no substantive evidence of wrongdoing, and they have allowed transcripts of malicious and slanderous accusations about suspects based solely on hearsay to be distributed to private and public sources in an apparent effort to injure and defame individuals whom they cannot arrest for lack of evidence (please refer to documents already in the Subcommittee's hands pertaining to *The Peregrine Fund, Inc.*).

Most serious of all, at least one agent (John Gavitt) and an informer (Jeff McPartlin) appear to have violated the prohibitions of the Endangered Species Act by physically aiding in the taking of wild eggs from the nest of a Peregrine Falcon in Utah. It is quite clear from their own written reports that they did aid and abet in the taking, and there would appear to be more than enough evidence for the Justice Department to bring indictments against these men, so that a judge or jury could decide their innocence or guilt. In regard to the "taking" of wildlife species by agents in the course of actions directed toward apprehending a suspect, there are important distinctions to be noted between what is permissible under the MBTA regulations (50 CFR 21.12(a)) and what can be done legally under the Endangered Species regulations (50 CFR 17.21 (c)(3) and (d)(2)). The migratory bird regulations allow agents to do whatever they want with protected birds, but the endangered species regulations specify quite clearly that there are only four circumstances under which agents may "take" endangered wildlife without a permit. While there are

provisions in paragraph (d)(2) that allow agents to "possess" and to "transport" endangered species in the course of their law enforcement duties, there are none that allow them to take for the purpose of apprehending a suspect or setting him up for a sting. Can the American people expect to see justice rendered in this case?

So far officials of the Departments of the Interior and Justice refuse to acknowledge that any of these abusive and improper actions have taken place. There is no indication that they are prepared to question seriously or to reprimand any officials or agents of the FWS Division of Law Enforcement, or to exercise any control to stop these violations of citizens' rights from continuing.

The law enforcement people expect falconers and breeders to tell them the absolute truth at all times, and we are required to keep detailed records on everything we do; but they think it is perfectly all right for them to lie in the course of their official duties, and they do lie to us and to the American people with impunity, except possibly when testifying under oath. I tell you—none of their figures on the numbers of birds involved in illegal dealings and none of the figures that others derive from them can be believed, unless and until they can be verified by an independent source.

From the treatment *The Peregrine Fund* has received from the FWS Division of Law Enforcement over the past year, I have to tell you, frankly, Mr. Chairman, I can no longer accept anything agents say or do at face value, and I believe that your Subcommittee would be well advised to exercise the same caution.

Mr. BREAUX. Thank you very much for your statement. We will, as I said, reserve questions until we get everybody's statements.

Jeffrey, you are next. We are glad to have you up again.

STATEMENT OF JEFFREY BROBERG, INTERESTED CITIZEN, LAFAYETTE, LA

Mr. BROBERG. Thank you, Mr. Chairman.

My name is Jeff Broberg. I am from Lafayette, LA. I am a petroleum geologist. My wife, Erica, is a thoroughbred horse breeder. Erica is a falconer. We work with the raptor rehabilitation program in Lafayette, LA. We are not spokesmen for any organizations or affiliations, and the opinions we express are our own based on Erica's experience with falconry over the last 8 years and the personal experiences of our friends who are falconers and raptor breeders and by our own independent research.

We believe that the provisions of the Endangered Species Act and the Migratory Bird Treaty Act allowing for the sale of captive bred endangered raptors are the most certain way to ensure the recovery of the peregrine falcon in the wild and, at the same time, allow falconers to pursue their labor of love with the peregrine falcon. We also believe that these farsighted provisions will serve future generations when they grapple with the problems of vanishing wildlife.

Mr. Chairman, the actions of this subcommittee and the U.S. Fish and Wildlife Service have paved the way for Congress to authorize the recovery of endangered species by exercising the ideals of free enterprise. The MBTA provisions and the raptor exemption have sent a clear message to the world that individuals and private organizations can become the foundation for the recovery of endangered species, supplementing the Government's management of wild populations without having to rely solely on Government funding or incentives. After all, it is competition and the ability of new breeders to enter the market that will simultaneously bring about the implementation of the most efficient production techniques, expand output, and lower the price to a level consistent with the cost of production.

As long as the peregrine falcon is endangered, we do not believe that the demand for captive bred birds will be met by placing economic restrictions on those desiring to breed peregrines. However, with the free market provisions, conservation efforts to purchase birds from private breeders for release to the wild could conceivably create a demand on raptor breeders that will result in the reestablishment of wild populations to the level that duck hunters and gamekeepers would be calling for depredation permits.

The falconry market, on the other hand, will be quickly saturated by virtue of the small number of licensed individuals who desire to use the peregrine falcon for their sport. Among our falconer friends, only a very small number, approximately 20 percent, would desire a peregrine falcon no matter how small the cost.

Mr. Chairman, we urge you and members of your committee to adopt a resolution that will not restrict the sale of birds to licensed individuals and thereby allow the free market to operate.

A provision being debated today would allow the sale of captive bred peregrine falcons only for domestic conservation purposes, calling into question the legitimacy of the sport of falconry. Erica and I are now faced with the political reality that we must defend our sport and work to preserve the Federal Falconry Standards in the face of vocal opposition.

We believe that a long-term antifalconry strategy exists and is designed to whittle away the privileges granted by the falconry standards and also to compound State and Federal regulations. The regulations will become so restrictive as to eliminate the sport by virtue of redtape.

Recent efforts have focused on passing restrictions at the Federal, State, and local level on obtaining and keeping birds for falconry. We believe that the current proposal in which the birds would not be available for sale to falconers implies that falconry is an illegitimate endeavor and is part and parcel of the antifalconry strategy.

The legitimacy of falconry as a sport has been recognized for centuries. Acts of Government and law have continued to validate our sport. Mr. Chairman, we ask you and your committee to help us protect our sport from this unfriendly movement that would erode our legitimate pursuits by preventing us from obtaining peregrine falcons.

Unfortunately, much of the posturing on the question of the sale of peregrine falcons centers on the sensationalized reports of an undercover sting operation entitle operation falcon. As we all know, the Service has, for the past 4 years, engaged itself in a sting designed to stop the illegal trade of birds of prey. We would like to offer our analysis of the notion that illegal actions toward wildlife can be thwarted by long-term sting operations.

Mr. BREAUX. Mr. Broberg, excuse me. We have a recorded vote. Let me go ahead and interrupt for a minute. We will recess until we catch the recorded vote and return and continue.

Mr. BROBERG. OK, fine.

Mr. BREAUX. We will recess for about 15 minutes.

[Short recess taken.]

Mr. BREAUX. The subcommittee will please come to order. We were taking the testimony of Mr. Broberg, if you will go ahead and continue, Jeffrey.

Mr. BROBERG. Shall I continue where I left off?

Mr. BREAUX. Yes.

Mr. BROBERG. Undercover and sting operations are customarily and routinely used in the pursuit of criminals involved in victimless crimes, such as drug trafficking, gambling, and prostitution. Articles used as bait are inanimate objects, including contraband, stolen goods, or money. This disposition of these articles poses no ethical questions. Social philosophers and enforcement agencies have generally accepted the idea that delayed or prolonged undercover activities do pose serious moral problems in cases where victims might be exposed to physical harm. Long-term sting operations conducted as fishing expeditions would be inappropriate where subjects were victimized. In cases where victims are exposed to harm, undercover operations are generally designed to be of short duration so that criminal activity can be immediately curtailed. It would be inconceivably immoral for a vice squad to undergo a 3-year undercover operation to discover the extent of child sexual abuse in day-care centers if evidence of such activity existed and the abuses could be stopped. We believe that these same moral questions must be raised in the consideration of wildlife crimes.

Wildlife related crimes are not strictly victimless crimes. Wildlife victims hold a special position in their lack of franchise and their inability to defend themselves against abuse, much like children.

Congress, in recognizing this defenseless posture, has created and perpetuated the U.S. Fish and Wildlife Service and charged them with managing and protecting wildlife from victimization by overzealous or criminal actions. The U.S. Fish and Wildlife Service affirms the existence of victims in operation falcon by making tallies of the number of birds involved. We believe that victimizing wildlife in an enforcement effort poses a very serious ethical problem.

We believe that the Service has violated their charter and the public's trust by perpetuating a number of long-term sting operations where the wildlife was envisioned as victims, employed as bait, and then seized and held as a confiscated article. We believe the bureaucracy of wildlife law enforcement has become confused and is in need of direction.

In operation falcon, the individual bird was no longer considered valuable. Agents harvested wild birds to establish an illegal trade and then confiscated the illegal and suspected of being illegal birds to be confined in captivity, often in substandard conditions without proper nutrition, exercise, or space.

In operation Trophy kill, U.S. Fish and Wildlife Service agents, in a long-term undercover operation, offered a bounty to a hunter to kill golden eagles. It has been reported that at least 11 golden eagles were killed and seized as evidence before the operation was concluded.

We ask your committee to place restrictions on the use of long-term sting operations and use your vested authority to periodically review, in closed door sessions, the specific details of all U.S. Fish and Wildlife Service undercover operations.

Operation falcon has had other far-reaching ramifications in wildlife enforcement and within the falconry community. We believe that operation falcon has compromised the principals of deterrence as an enforcement goal. Sociological studies cite three principal variables in the establishment of deterrence: informal social controls, certainty of punishment, and severity of punishment. The Service has arbitrarily failed to uphold the ideals of effective deterrence by compromising all three variables.

In our experience in the falconry community, we have witnessed a lofty tradition of social control. Beginning as an apprentice falconer, you are taught that the Federal Falconry Standards exemplify the traditions, beliefs, practices, and attitudes about falconry. Falconers who did not follow the practices prescribed by the social norm as defined in the Standards are considered outlaws and are subject to their peers' displeasure, gossiped about, and often ostracized.

Because of the pervasive opinion that those accused in Operation Falcon were entrapped and cleverly led into unacceptable activity by government operatives, we believe the accused falconers have not been subject to these informal social controls and are not perceived as outlaws by their peers. Our conclusion from this observation is that the use of entrapment for the enforcement of falconry standards has led to the deterioration of the social control mechanism that ostracizes those guilty of wrongdoing. This is not to say that the social attitudes toward wrongdoing have been abandoned, but rather that the individuals accused in this particular situation may not suffer any loss of status from within their community and, indeed, the Government actions against them may have even elevated their status to those of martyrs.

Because of the current mistrust of the U.S. Fish and Wildlife agents stemming from Operation Falcon, another aspect of the social control has been compromised, the notion that it is morally correct to report to the authorities those individuals who have moved outside the law and outside the social norm. We now sense among our falconer friends a distrust of wildlife officials and the attitude that enforcement agents may be unscrupulous or double-dealing because of the use of the sting. We have heard the comment by some that they would now be loathe to cooperate with a Fish and Wildlife Service investigation. We believe that the deterioration of this ethic will place an extra, unwanted burden on enforcement officials.

The deterioration of the informal social controls that ostracize criminals and lead individuals to cooperate with enforcement officials will probably not cause an upswing in wrongdoing, but the loss of the public's trust will undoubtedly make the enforcement task much more difficult.

In the final ruling on raptor breeding permits, the Service cites the intent for certain and severe punishment for those involved in tampering with leg bands of raptors. We believe that the actual enforcement record is not that clear.

In 1982, when Operation Falcon was initiated, the Federal Falconry Standards had been in force for only 10 years. At the conclusion of this undercover dragnet in 1984, allegations of 3-years' worth of wrongdoings were compiled and suspects were arrested.

The 3-year hiatus in overt, systematic enforcement represents 25 percent of the time period that falconry laws have been in force. Certainty as a factor in deterrence cannot begin to play a role in preventing crime if individuals see no enforcement efforts for such extended periods of time.

We believe that the announcement of Operation Falcon and the ensuing actions of the Service and courts have had a deterrent effect. Unfortunately, we believe much of the deterrence has been derived from the heavyhanded actions of the Service and the fear held by many individuals that the Service would retaliate in a vicious manner if objections were raised or rulings were challenged. We have been the witness to cruel, arbitrary, and insensitive actions by the Service toward a friend who breeds raptors in New Orleans, LA, and we have personally witnessed and experienced the fear of retaliation by officials from the Atlanta U.S. Fish and Wildlife District Office.

Operation Falcon has had a deterrent effect on those who would commit casual violations of the Federal Falconry Standards, but we must ask at what cost this deterrence has been accomplished. We have observed the deterioration of social mores in the falconry community because of enforcement actions using the sting operation. We have observed an erosion of trust and confidence that many people once held for the U.S. Fish and Wildlife Service. We have witnessed the fear that powerful individuals might take retaliations based on personal conflicts or capricious attitudes. Most sadly, we are witnessing a decline in respect for Government and the legal system.

Mr. Chairman, we must take control and weigh the cost.

For all practical purposes, Operation Falcon is history. The damage is done, the criminals apprehended, the public deterred, and society placed on notice. Mr. Chairman, we ask your subcommittee and the organizations and individuals who are here to join forces to work toward a reconciliation so we may reach the common goal of protecting our wildlife and preserving the time-honored traditions of falconry.

Thank you.

[Prepared statement of Mr. Broberg follows:]

PREPARED STATEMENT OF JEFFREY AND ERICA BROBERG

INTRODUCTION

Mr. Chairman and members of the Committee, we are Jeff and Erica Broberg from Sunset, Louisiana. I am a petroleum geologist and Erica is a Thoroughbred horse breeder. Erica is a falconer and we work with a raptor rehabilitation program in Lafayette, Louisiana. We are not spokesmen for any organization or affiliation, and the opinions we express are our own based on Erica's experience with falconry, the personal experiences of our friends who are falconers and raptor breeders, and by our own independent research. We appreciate the opportunity to voice our thoughts on the status of the Peregrine Falcon and the impact that these proceedings have on the future of endangered raptors and the future of the sport of falconry. We request that our statement be printed in the proceedings of these hearings.

We believe that the provisions of the Endangered Species Act and the Migratory Bird Treaty Act allowing for the sale of captivebred endangered raptors are the most certain way to insure the recovery of the Peregrine Falcon in the wild and at the same time allow falconers to pursue their labor of love with the Peregrine Falcon. We also believe that these far-sighted provisions will serve future generations when they grapple with the problems of vanishing wildlife.

THE FREE ENTERPRISE SOLUTION

Mr. Chairman, the actions of this Subcommittee and the U.S. Fish and Wildlife Service have paved the path for Congress to authorize the recovery of endangered species by exercising the ideals of free enterprise. The Congressional mandate of the 1978 Endangered Species Act Raptor Exemption and the pending reauthorization of that Act, in concert with the 1983 Implementation of the Endangered Species Act Exemption for certain Raptors; Raptor Propagation Permits; Federal Falconry Standards (50 C.F.R. pt 13, 17 and 21) have sent a clear message to the world that individuals and private organizations can become the foundation for the recovery of endangered species, supplementing the government's management of wild populations without having to rely solely on government funding or incentives. These provisions make skilled individuals free to take a financial risk and free to spend their time and resources developing breeding projects with the goal of being compensated for the rewarding task of fostering the progeny of the world's most graceful birds. After all, it is competition and the ability of new breeders to enter the market that will simultaneously bring about the implementation of the most efficient production techniques, expand output and lower the price to a level consistent with the cost of production.

Opponents of the Raptor Exemption and the Raptor Propagation Rules argue that Peregrine breeding projects existed before the sale of Peregrines was allowed. They argue that these programs would continue to carry the staff of life for the Peregrine Falcon if sale were prohibited. Before the sale provision existed, the organizations breeding falcons did so with monies donated by a concerned public or government grants and allocations. These programs would be jeopardized if the generosity of the public or government should falter. The individuals who bred Peregrines without the consideration of financial remuneration were devoted hobbyists and concerned citizens, most of whom were falconers. These rare individuals are the personification of the unselfish idealism of wildlife conservation and it is true that this small number of individuals will probably continue to breed Peregrines whatever the obstacles. However, the Raptor Breeder's Association estimates that in 1983 the number of individuals breeding Peregrines had more than doubled in anticipation of the new regulations, from less than twenty individuals before to approximately forty in anticipation of the sale, to more than sixty today. The free market incentive implemented in the 1983 Raptor Propagation ruling opened the doors of opportunity for new enterprises to begin breeding Peregrines.

As long as the Peregrine Falcon is endangered, the demand for captive-bred birds will not be met by placing economic restrictions on those desiring to breed Peregrines. However, with the free market provisions, conservation efforts to release birds to the wild could conceivably create a demand on raptor breeders resulting in the re-establishment of wild populations to the point that duck hunters and gamekeepers would be calling for deprecation permits. The falconry market, on the other hand, will be quickly saturated by virtue of the small number of licensed individuals who desire to use the Peregrine for their sport. Among our falconer friends only a very small number (approximately 20%) would desire a Peregrine Falcon no matter how small the cost.

We feel that the free market solution will reduce the opportunity for a black market to operate. Making captive-bred birds readily available at reasonable prices to all the qualified individuals desiring them will reduce the incentive to take wild birds. The danger of illegal markets increases if a syndication or cartel is allowed to keep the prices artificially high or acts to form a monopoly controlling the production or distribution of the captive-bred birds. This circumstance cannot be tolerated because it would increase the likelihood that individuals would take wild birds rather than pay the artificially high prices controlled by the cartel. The U.S.F.W.S. has addressed this concern in the Final Ruling on Raptor Propagation Permits (Federal Register, vol. 48, no. 132, July 8, 1983, p. 31602) and has affirmed the idea that the free market will prevail and thus supply and demand will determine prices. Mr. Chairman, we urge your Committee to adopt a resolution that will not restrict the sale of birds to licensed individuals and thereby allow the free market to operate.

THE USE OF REGULATION TO STOP ILLEGAL HARVESTS OF WILD BIRDS

In concert with the recovery of endangered raptors through captive breeding it is incumbent that society preserve and protect the wild populations of birds from individuals who would do them harm or attempt to profit from the public trust. The goal of interrupting the illegal harvest of wild birds can be facilitated if the U.S.F.W.S. would adopt standards for the positive biologic identification of raptors. If positive means of individual identification such as "fingerprinting" or blood-

typing were implemented, there would be no dispute over the origins (wild or captive-bred) of a particular bird. The permanent metal bands currently distributed by the Service for use on captive-bred birds available for sale are a vast improvement over the adjustable nylon bands which the Service admits are not tamper-proof. However, any banding methods fall short of the biological techniques that provide positive identification. Unfortunately, the agenda for positively identifying the wild versus captive-bred origins of a bird in order to thwart any illegal harvest has been neglected in favor of the enforcement option. Mr. Chairman, we urge your Committee to direct the U.S.F.W.S. to implement a biologic identification system for captive-bred raptors as part of the pending review of falconry standards.

FALCONRY AS A LEGITIMATE PURSUIT

A provision being debated today would allow the sale of captive-bred Peregrine Falcons only for domestic conservation purposes, calling into question the legitimacy of the sport of falconry. Erica and I are now faced with the political reality that we must defend our sport and work to preserve the Federal Falconry Standards in the face of vocal opposition. We believe that a long-term anti-falconry strategy exists and is designed to whittle away the privileges granted by the Falconry Standards and also to compound state and federal regulations. The regulations will become so restrictive as to eliminate the sport by virtue of red tape. Recent efforts have focused on passing restrictions at the federal, state and local level on obtaining and keeping birds for falconry. We believe that the current proposal in which birds would not be available for sale to falconers, implies that falconry is an illegitimate endeavor and is part and parcel of the anti-falconry strategy.

Analyzing our personal experiences with the anti-falconry factions, we have found three prevailing attitudes that we believe result from misunderstanding of the roles of raptors and falconers. A common anti-falconry judgment is leveled on the predatory birds themselves. Many people perceive birds of prey as evil, disgusting opportunists. This notion passes a moral judgment on nature itself. In the natural world, animals kill to live, free of ethical systems and moral values. Birds of prey fulfill their destiny by killing creatures. There is no right or wrong, good or evil, morality or immorality in their actions: they are hungry. The second anti-falconry judgment is passed on the falconer with the argument that a human being should not employ an animal to kill another animal. This homocentric rationale focuses tunnel vision on the falconer, denying the place of the raptor in nature's balance, forgetting that these birds kill other animals whether or not a falconer is in attendance. This judgment also rejects the falconer's perspective that we, as mature human beings, can observe the play of nature in order to gain an uncluttered insight into our deeply rooted emotions and reactions. To witness the athletic and quick-witted actions of a bird in pursuit of prey is one of the few activities permitted to man that clears the dust from one's eyes. The final judgment is that wild creatures should not be kept in captivity. This romantic idealism denies the good that has been done by the captive breeding of animals whose vanishing habitats would relegate these species to the textbooks of future generations. Secondly, this notion denies the fact that our falconry birds are our beloved companions. Our birds are free to leave every single time we hunt, but they usually do not. We pamper them and care for their physical needs, keeping them in much the same way we would train an equine athlete. The chances are better than even that the bird you see free in the sky will not survive the winter because of hunger, accident or disease. A falconer's bird is not subject to the famine, disease, toxins or parasites to the same extent their wild counterparts are, and the falconry bird can often live as long as twenty years in captivity. Contrast this lifestyle to the plight of birds in zoos, kept in limited space, receiving no exercise and becoming bored with their confined existence. Falconer's birds are allowed to fly free and fulfill their destiny. The anti-captivity judgment also denies the fact that the birds do not fly away because the birds find it advantageous and most efficient to have a human hunting companion.

The legitimacy of falconry as a sport has been recognized for centuries. Acts of government and law have continued to validate our sport. Mr. Chairman, we ask you and your Committee to help us protect our sport from this unfriendly movement that would erode our legitimate pursuits by preventing us from obtaining Peregrine Falcons.

OPERATION FALCON

Unfortunately, much of the posturing on the question of the sale of the Peregrine Falcon centers on the sensationalized reports of an undercover "sting" entitled "Operation Falcon." As we all know, the Service has for the past four years engaged

itself in a sting operation designed to stop the illegal trade of birds of prey. We are not going to attempt a debate regarding the facts of how many people, birds or monies were involved, nor do we dispute that any illegal trade in birds should be stopped. We would like to offer our analysis of the notion that illegal actions toward wildlife can be thwarted by long-term sting operations.

Undercover and sting operations are customarily and routinely used in the pursuit of criminals involved in victimless crimes such as drug trafficking, gambling and prostitution. Articles used as bait are inanimate objects including contraband, stolen goods or money. The disposition of these articles poses no ethical questions. Social philosophers and enforcement agencies have generally accepted the idea that delayed or prolonged undercover activities do pose serious moral problems in cases where victims might be exposed to physical harm. Long-term sting operations conducted as "fishing expeditions" would be inappropriate where subjects were victimized. In cases where victims are exposed to harm, undercover operations are generally designed to be of short duration so that criminal activity can be immediately curtailed. It would be inconceivably immoral for a vice squad to undergo a three year undercover operation to discover the extent of child sexual abuse in daycare centers if evidence of such activity existed and the abuses could be stopped. We believe that these same moral questions must be raised in the consideration of wildlife-related crimes.

Wildlife-related crimes are not strictly victim crimes. Wildlife victims hold a special position by their lack of franchise and their inability to defend themselves against abuse, much like children. Congress, in recognizing this defenseless posture, has created and perpetuated the U.S.F.W.S. and charged them with managing and protecting wildlife from victimization by overzealous or criminal actions. The U.S.F.W.S. affirms the existence of victims by making tallies of the number of birds involved in Operation Falcon. We believe that victimizing wildlife in an enforcement efforts poses a very serious ethical problem.

We believe that the Service has violated their charter and the public's trust by perpetuating a number of long-term sting operations where the wildlife was envisioned as victims employed as bait and then seized and held as a confiscated article. We believe that the bureaucracy of wildlife law enforcement has become confused and is in need of direction.

In Operation Falcon, the individual bird was no longer considered valuable. Agents harvested wild birds to establish an illegal trade and then confiscated the illegal and suspected-of-being-illegal birds to be confined in captivity, oftentimes in substandard conditions without proper nutrition, exercise or space. In Operation Bounty Hunter, U.S.F.W.S. agents, in a long term undercover operation, offered bounty to a hunter to kill Golden Eagles. It has been reported that at least eleven Golden Eagles were killed and seized as evidence before the operation was concluded. Mr. Chairman, we do not believe that your Committee would conscientiously authorize the Service to sacrifice our wildlife in order to trap smugglers or bounty hunters. We ask your Committee to place restrictions on the use of long-term sting operations and use your vested authority to periodically review, in closed door session, the specific details of all U.S.F.W.S. undercover operations.

Operation Falcon has had other far-reaching ramifications in wildlife enforcement and within the falconry community. We believe that the use of enforcement and social control for deterrence has been compromised by Operation Falcon. Sociological studies cite three principal variables in the establishment of deterrence: (1) informal social control; (2) certainty of punishment; and (3) severity of punishment. The Service has arbitrarily failed to uphold the ideals of effective deterrence by compromising all three variables.

In our experience in the falconry community we have witnessed a lofty tradition of social control. Beginning as an apprentice falconer you are taught that the Federal Falconry Standards exemplify the traditions, beliefs, practices and attitudes about falconry. Falconers who did not follow the practices prescribed by the social norm as defined in the Falconry Standards are considered "outlaws" and are the subject of their peers' displeasure, gossiped about and oftentimes ostracized. Because of the pervasive opinion that those accused in Operation Falcon were entrapped and cleverly led into unacceptable activity by government operatives, we believe the falconers accused in Operation Falcon have not been subjected to these informal social controls and are not perceived as outlaws by their peers. Our conclusion from this observation is that the use of entrapment for the enforcement of falconry standards has led to the deterioration of the social control mechanism that ostracizes those guilty of wrongdoing. This is not to say that the social attitudes towards wrongdoing have been abandoned, but rather that the individuals accused in this situation may

not suffer any loss of status from within their community, and indeed the government actions against them may even have elevated their status to those of martyrs.

Because of the current mistrust of the U.S.F.W.S. agents stemming from Operation Falcon, another aspect of social control has been compromised: the notion that it is morally correct to report to the authorities those individuals who have moved outside the law and outside the social norm. One of our local U.S.F.W.S. agents in Lafayette, Louisiana recently commented to me that when he worked in California, falconers would continually call him at all hours to report that so-and-so was mishandling their birds or that so-and-so had too many birds. The informal social controls of proper falconry practices made it acceptable behavior to inform on a peer in the interest of the birds' welfare. This attitude also displays the degree of confidence and trust falconers held for the Service and their perception that the Service would act expeditiously and with certainty to stop abuses. We now sense among our falconer friends a distrust of wildlife officials and the attitude that the enforcement agents may be unscrupulous or double-dealing because of the use of the sting. We have heard the comment by some that they would now be loathe to cooperate with a U.S.F.W.S. investigation. We believe that the deterioration of this ethic will place an extra unwanted burden on enforcement officials.

The deterioration of the informal social controls that ostracize criminals and lead individuals to cooperate with enforcement officials will probably not cause an upswing in wrongdoing, but the loss of the public's trust will undoubtedly make the enforcement task more difficult.

By inconsistently enforcing the law, the axiom that certainty and severity of punishment are the central variables in the preventive effects of deterrence have also been compromised by the Service's action. For example, as raptor rehabilitation workers, we see that punishment for the wanton destruction of protected raptors is spotty to nonexistent. The crime of shooting raptor is typically left to the discretion of the local enforcement agent who most commonly issues a warning, compromising the certainty of punishment rule. If citations are given, the local magistrates dispatches the case with small, inconsequential fines, whereby the severity of punishment rule is compromised. A sad commentary to this fact is that when the laws preventing the destruction of raptors are not upheld there is no deterrent effect. This is perfectly illustrated by a question posed by a third-grade girl during an eagle presentation we attended: "How much does it cost to shoot a Bald Eagle?"

Resource allocation does not allow the U.S.F.W.S. to go searching for those who destroy out wildlife, but if they do not strictly enforce the existing regulations when an offender falls in their lap is it reasonable to expect people will be deterred from keeping unauthorized birds? When the laws preventing the destruction of raptors are not upheld there is little deterrent effect for the regulations prescribing the care and handling of healthy live birds. We believe that the deterrence for the mishandling of falconry birds and the violation of the Federal Falconry Standards comes from informal social controls established within the ethical framework of the falconry community and not from the inconsistent enforcement efforts of the U.S.F.W.S. Mr. Chairman, we urge your Subcommittee to stiffen the penalties against harming raptors in the interest of deterrence and make it imperative that the Service enforce the full strength of the regulations against violators who would do such harm.

In the Final Ruling on Raptor Breeding Permits the U.S.F.W.S. cites the intent for certain and severe punishment for those involved in tampering with the leg bands of raptors. We believe that the actual enforcement record is not that clear. In 1982, when Operation Falcon was initiated, the Federal Falconry Standards had been in force for only ten years. At the conclusion of this undercover dragnet in 1984, allegations of three years' worth of wrongdoings were compiled and suspects were arrested. The three year hiatus in overt, systematic enforcement represented 25% of the time period that falconry laws had been in force. The effect of certainty as a factor in deterrence cannot begin to play a role in preventing crime if individuals see no enforcement efforts for such extended periods of time.

We believe that the announcement of Operation Falcon and the ensuing actions of the Service and the courts have indeed had a strong deterrent effect. Unfortunately, we believe that much of the deterrence has been derived from the heavy-handed actions of the U.S.F.W.S. and the fear held by many individuals that the Service would retaliate in a vicious manner if objections were raised or rulings were challenged. We have been the witness to cruel, arbitrary and insensitive actions by the U.S.F.W.S. toward a friend who breeds raptors in New Orleans, Louisiana, and we have personally witnessed and experienced the fear of retaliation by officials in the Atlanta U.S.F.W.S. District Office.

Our friend, who will remain nameless, breeds Harris' Hawks in New Orleans and became the subject of an Operations Falcon investigation because of malicious

gossip and ensuing contracts with Jeffrey MacPartlin. Agents came to his home June 29, 1984 with a warrant to seize his documents and any of a number of exotic birds rumored to be on his premises. The agents found his operation in order, found no illegally held raptors, and proceeded to interrogate him about his breeding program. In the spirit of cooperation, our friend spoke at length during a tape recorded interview about aspects of his breeding operation, including donations he received for his project and the disposition of the birds he had bred. He was not charged with any crime but after hearing the reports of trumped-up charges leveled against other falconers and breeders he lived in fear that the Service would issue sanctions against him based on false information supplied by informants or the unsubstantiated gossip that he knew existed in the falconry community. He forgot about the interview and the warrants against his documents until the spring of 1985, the new breeding season. He had three mated pairs of Harris' Hawks and successfully double-clutched fertile eggs. As the eggs began to hatch, he notified the regional office of U.S.F.W.S. that he would need forty seamless leg bands before the birds grew too big to slip the bands over their feet; in about two weeks for the first chicks. At this time he was told by the permitting agent, Burma Campbell, that he would not be allowed to receive the seamless metal bands because his breeding project was being jeopardized by a continuing investigation. Incredulous, he asked what the investigation was about and why they had waited until he had produced fertile eggs and chicks to notify him of this problem. Ms. Campbell refused to discuss the details of the investigation and made the insensitive and ignorant suggestion that he break up the mated pairs, implying that he should not incubate and hatch the eggs because he would not be permitted to receive the bands that would authorize the sale of the birds this year, believing perhaps that the broken mated pairs would just naturally form a pair bond for next year's breeding. Moving to the next level of the U.S.F.W.S. command, he contacted Dan Searsy about the problem. Mr. Searsy became belligerent and told our friend that he didn't care if his birds were unbanded and that if he persisted in making trouble all of his permits would be revoked.

At this time Erica and I became involved on our friend's behalf and speaking with officials in the Atlanta office we found them to be unhelpful and discourteous, displaying the attitude that they would and could enforce the law as they saw fit and at their whim and that they could make it difficult for any falconer they perceived as a troublemaker. We argued that they could not properly withhold our friend's bands based on an incomplete investigation, arguing that this would mean that our friend's forty birds would not be properly banded for sale if the question was not resolved within the next week to ten days. We felt that this action denied our friend due process and was tantamount to punishing him before charges were brought against him or a jury had the opportunity to find his innocence or guilt. An assistant to the Atlanta Regional Director was unswayed by my arguments and commented that all the falconry and breeding permits and bird bands were granted at the discretion of the Service, and they could withhold or revoke those privileges granted under the Falconry Standards for probable cause. Our friend feared retaliation if we made trouble for the Service, but faced with the consequences of losing all of his birds anyway, the decision to press for justice was the only remaining option.

After pursuing channels at higher levels the argument prevailed that the actions of the U.S.F.W.S. denied our friend due process in light of the fact that the growing birds could not be legally sold if they were not banded no matter what the outcome of the incomplete investigation. The U.S.F.W.S. then provided our friend with thirty-five bands, five less than originally requested. By the time he received the bands five more eggs had hatched and five of the chicks had grown too large to be banded. The callous attitude of the U.S.F.W.S. regional officials and the long delays in the regional office caused our friend the loss of the ability to sell the ten Harris' Hawks that could not be banded, causing a \$4,000 loss of potential revenues that would have gone toward supporting his continuing raptor breeding effort. Our friend's case has been concluded and he has been asked to pay a fine for alleged wrong-doings in giving birds to individuals who made donations to his breeding project.

This incident has given us the impression that the regional bureaucracy of the U.S.F.W.S. in Atlanta is insensitive toward the breeding birds and were not interested in upholding the legal virtues of our Constitution. The threats of withholding or revoking licenses and the comments that the bureaucracy could make it difficult for their opponents is tantamount to extortion, and we and our friends still fear retaliation. If it were not for the final actions of the U.S.F.W.S. administration and our contact with our local Service enforcement agents and biologists, who we know have a deeply held respect and concern for wildlife, we would conclude that the Service is not interested in wildlife, but only interested in perpetuating their own existence.

Operation Falcon has had a deterrent effect on those that would commit casual violations of the Federal Falconry Standards but we must ask at what cost this deterrence has been accomplished. We have observed the deterioration of social mores in the falconry community because of enforcement actions. We have observed an erosion of trust and confidence that many people once held for the U.S.F.W.S. We have witnessed the fear that powerful individuals might make retaliations based on personal conflicts or capricious attitudes. Most sadly, we are witnessing a decline in respect for government and the legal system. Mr. Chairman, we must take control and weigh the cost.

For all practical purposes Operation Falcon is history, the damage is done, the "criminals" apprehended, the public deterred and society placed on notice. Mr. Chairman, we ask your Subcommittee and the organizations and individuals that are here to join forces to work toward a reconciliation so we may reach the common goal of protecting our wildlife.

CONCLUSION

We would like to thank the Chairman and the members of the Subcommittee for your attention and consideration of our views. We have attached an outline of our proposals and ask that with your permission this outline be submitted as part of the record of these proceedings.

PROPOSALS TO THE SUBCOMMITTEE ON FISHERIES, WILDLIFE CONSERVATION AND THE ENVIRONMENT

1. Preserve the free market solution to endangered species by maintaining the preserves for the sale of captive-bred raptors to all authorized parties.
2. Direct the U.S.F.W.S. to implement a biological identification system for captive-bred raptors in an effort to thwart the illegal harvest of wild birds.
3. Help preserve the traditions of falconry by affirming the views and provisions that falconry is a legitimate sport and by resisting the attempts of anti-falconry groups to revoke the privileges of falconers or compound the falconry regulations.
4. Pass legislation that sets the standards of wild bird care in rehabilitation projects using the Federal Falconry Standards guidelines for minimum housing.
5. Place restrictions on the use of long-term sting operations in investigating wildlife-related crimes.
6. Reserve the right to periodically review, in closed door sessions, the specific details of all U.S.F.W.S. undercover operations.
7. Help the common goal of protecting our birds of prey by continuing to serve as forum and to act as a mediator and lending force in the reconciliation of interested groups in the aftermath of Operation Falcon.

Mr. BREAU. Thank you very much, Mr. Broberg, for your statement.

Next, we will hear from Mr. Frank Bond of the North American Falconers Association.

STATEMENT OF FRANK BOND, NORTH AMERICAN FALCONERS ASSOCIATION

Mr. BOND. Thank you, Mr. Chairman.

I am Frank Bond, an attorney from Santa Fe, New Mexico, a falconer, and a raptor propagator. I am pleased to be here to represent the North American Falconers Association.

Obviously, this one further hearing is to focus on the issue of commercialism which is addressed in the legislation now pending before this subcommittee and dealing with the 1978 raptor exemption. Unfortunately, we are gathered here, really, as a result of Operation Falcon.

But by way of background, the North American Falconers Association supports the reauthorization of the Endangered Species Act as we did in the March hearings before your subcommittee, including the raptor exemption. As a little bit of history for those who might not have been here, the exemption was passed in 1978, but

the regulations were not promulgated to effect that exemption until July of 1983, a full 5 years later. The band which is the cornerstone of those regulations was not developed until the fall of 1983, after the 1983 breeding season. Therefore, effectively, the regulations didn't go in until 1984. Thus, to date, Mr. Chairman, we have had 2 years under the regulations since the passage of that exemption in 1978.

There were three types of bands. There has been a considerable amount of confusion with respect to bands. The three are the black nylon band which was used to band wild birds for falconry purposes, a yellow nylon cable tie-type band which denotes captive bred birds, and finally the cornerstone of the 1983 regulations, the anodized aluminum seamless marker which indicates a bird is captive bred and would be allowed for sale.

I think it is important because, as far as we know to date, the aluminum seamless marker was not involved in Operation Falcon at all. It really could have been, I suppose, had it been used in 1983. That being the case, if there are any questions by the subcommittee with respect to bands, we would be happy to answer them because of the confusion that still persists.

Operation Falcon, which has been the subject of some discussion here today, indicated, at least in the eyes of the Fish and Wildlife Service, that there was a considerable black market in illegally harvested wild birds. It seems to us, by the information supplied from public sources, that is, public documents, rule 11 statements, affidavits in support of search warrants, et cetera, that is not truly apparent in the United States.

John Jeffrey McPartlin who was the sting operator living in Montana and who worked with the Fish and Wildlife Service in conducting this operation seems to us to have been the largest operator. In fact, during the course of the operation, he was turned into various officials for illegal activities. Obviously, because of his role in the operation, nothing was done.

We recognize that there were violators and violations committed, many charged, and most plead to misdemeanors after having been charged with felonies. Obviously, many people will plead because of the cost of defense. That still is no excuse. We do not condone any illegal activities as an association, and the people who have been convicted who are members of our association have all been removed from membership.

NAFA, I want to also indicate, does not oppose sting operations per se, that is, when they are conducted within strict guidelines. And the strict guidelines I suggest that ought to be followed to the letter are the Attorney General of the United States' guidelines for undercover activities and also his guidelines for the use of informants and confidential sources. Those guidelines were the subject of hearings a couple of years ago, both in the House and the Senate, dealing with undercover activities. We think it would be appropriate that there be strict adherence to these by the Fish and Wildlife Service.

On the other hand, in Operation Falcon, the North American Falconers Association seriously objects to the June 29, 1984, press release which was a broad brush condemnation of all falconers and falconry. There was an indication of black market, as I indicated

earlier, and the number of birds involved in that press release still have not been corroborated.

Similarly, Mr. Chairman, you indicated by your questions to Mr. Lambertson our concerns of complicity of the Division of Law Enforcement with the Audubon Society. Their press release came almost simultaneously on June 29, and their numbers did not coincide with the Fish and Wildlife Service's numbers. In fact, they were amplified, and Mr. Amos Eno who is here with us today indicated in an interview with Alaska public radio that he in fact exaggerated those numbers. There is a transcription of that tape available.

Further, Mr. Chairman, the second thing we seriously object to is this document entitled "Operation Falcon." Regardless of how it got out, regardless of who was responsible, the damage is done to certain individuals. In my mind, Mr. Chairman, there is simply no excuse for it. If Mr. Lambertson can't get hold of it, I don't understand how authorities in New York and in Idaho and in other states are able to get hold of it.

Finally, Mr. Chairman, in terms of the handling of the confiscated birds, we continue to be concerned. Many of those birds are still held. The remission process is at a standstill. People have complied with the first aspects of the remission process, thereby putting the ball back in the court of the Fish and Wildlife Service to go forward, yet birds are still being held and the remission process not going forward.

As a policy, we also believe that in terms of disposition of certain of the birds which may be human imprinted, that these ought not be returned to the wild.

Mr. Chairman, now turning to the issue at hand which is commercialism, we believe that captive propagation diminishes the temptation to take birds from the wild and that some captive propagators are the sole suppliers for some State conservation projects. We think that is an ongoing project and ongoing activities which are beneficial.

We also believe, given the fact that the captive propagation regulations have only been in effect for 2 years, that it would be hasty to rescind the amendment based on the fact that the captive propagators have not had the time or the inclination or for whatever reason to have donated birds to the wild.

Furthermore, Mr. Chairman, the Fish and Wildlife Service's own recovery plans are the first and initial barrier to actually donating birds for purposes of release. I would be happy to expand on that if you want.

Furthermore, captive propagators holding birds do so in the event that there is some large catastrophe at one of the major institutional breeding facilities, such as the Peregrine Fund. When the Peregrine Fund or other institutional breeders might cease, there will be a residual population of captive peregrines in the event there is a catastrophe in the environment, and birds would be available for release for those purposes.

We believe that falconers and captive propagators in the private sector have increased scientific knowledge with respect to specific areas. The amendment further facilitates movement of birds from the institutional breeders and from other breeders to falconers

when the useful life for breeding has terminated with the birds, and they can then be used for falconry purposes or for some residual captive propagation efforts.

Finally, the commercial aspect of the exemption allowed by the regulations is that in our own system of commerce, it is an acceptable and reasonable means of exchange among people.

Mr. Chairman, there is no group of people today who have a better understanding of what the peregrine is and what it does and what it really means than do the falconers of this country. We would ask that the subcommittee accept this fact both as an expression of our sincerity and also as a guarantee, if you will, of our continued commitment to this species and its survival for all time and for all people.

While we deeply regret the circumstances that brought us to these hearings, we have also come to realize that they afford us the only opportunity for a meaningful forum. The Endangered Species Raptor Exemption of 1978 and the Service's Operation Falcon must be kept in perspective if reasonable decisions are to be reached.

The logical, factual, and verifiable material we have presented here today is in keeping with article 1, section 2 of the constitution of the North American Falconers Association which reads, in part:

To promote conservation of birds of prey, and in appreciation of their value in nature and in Wildlife Conservation Programs, to urge recognition of falconry as a legal field sport, and to establish traditions which will aid, perpetuate, and further the welfare of falconry and the raptors it employs.

It must be clear, Mr. Chairman, that we cannot succeed in any of these endeavors without a healthy raptor population. The very essence of that which we hold most dear depends entirely on the survival of the peregrine falcon. Given the continued consent of Congress and the understanding of serious conservationists, we will see both falcons and falconry survive.

Mr. Chairman, on behalf of the Board of Directors and the membership of the North American Falconers Association, I thank you for the opportunity to be here today.

[Prepared statement of Mr. Bond follows:]

PREPARED STATEMENT OF FRANK M. BOND, THE NORTH AMERICAN FALCONERS
ASSOCIATION

INTRODUCTION

Mr. Chairman and members of the Committee, I am Frank M. Bond, an attorney from Santa Fe, New Mexico. I am here today to represent The North American Falconers Association, which is an international organization of falconers from the United States and Canada. We appreciate the opportunity to present testimony and request that our statement be printed in the proceedings of these hearings.

ENDANGERED SPECIES ACT

On March 14, 1985 the North American Falconers Association appeared in support of H.R. 1027, the Reauthorization of the Endangered Species Act (Act), 16 U.S.C. 1531 *et seq.* At that Hearing we urged the Committee to retain Section 9(b) as written with respect to the Raptor Exemption adopted in 1978. The Committee agreed with our position. We urge the Committee today to reaffirm the need for the 1978 Raptor Exemption.

OPERATION FALCON

On June 29, 1984, the Division of Law Enforcement of the U.S. Fish and Wildlife Service (Service) revealed its Operation Falcon, a three year covert "Sting" operation. The Service's June 29 joint press release, by then Secretary of the Interior William Clark and then U.S. Attorney General William French Smith, claimed large scale black market dealings by falconers of hawks and falcons both in the United States and abroad. This Subcommittee must not be confused that Operation Falcon was necessary because there were abuses of the 1978 Exemption to the Act; as far as we know, there are to date no charges against any defendant based on this Exemption.

After reviewing indictments, affidavits in support of search warrants, and Rule 11 Statements (all public records), and Reports of Investigation (supplied by defendants), we find no evidence of a large scale black market in the United States. In fact, prior to the black market ring set up by the Division of Law Enforcement, there appears to have been essentially no black market at all. The agents in Operation Falcon were unable to buy any raptors in the United States.

As a consequence of Operation Falcon, the Division of Law Enforcement produced an undated and unsigned summary paper of its actions entitled Operation Falcon. Because of the way the document presented data, it smears by innuendo many U.S. falconers and raptor propagators. We suggest that the members of this Subcommittee review the paper in camera as we do not wish it to be printed as part of these proceedings. We believe the paper was sent to many state law enforcement agencies. The document includes such things as a list of occupations of people purportedly arrested and listed as defendants, when, in fact, some were not. Defendants and suspects are interchanged freely so as to confuse the reader as to how many people have been arrested. There is a listing of birds involved, but without relation to the individuals charged or violations of law or even the country where the birds were taken. It includes a series of statements out of context and without reference to a particular case, including one from an individual who was acquitted. The final part is a particularly savage and scurrilous attack on The Peregrine Fund. This Subcommittee should see that action is taken to censure and reprimand the author of this damaging paper.

The North American Falconers Association believes the Service, through its covert Operation Falcon and by its suspension of enforcement, not only encouraged but also participated in the misuse of wildlife. The June 29, 1984 press release and the document, Operation Falcon were particularly damaging to the North American Falconers Association membership because they represent an unjustified, broad-brush condemnation of all American falconers.

Nevertheless, Operation Falcon gathers us here to evaluate the efficacy of the 1978 Raptor Exemption which in part provides the basis for commercial activities with captive bred peregrine falcons. We emphasize that scrutiny of the current circumstances must focus on the United States experience, not on Canada because their system of protection and regulation bears no resemblance to ours. The concern is that peregrine falcons, illegally taken from the wild, are being sold in commerce. Operation Falcon simply does not reveal that to be a biologically significant problem in the United States.

The costs of Operation Falcon to the American public, on the other hand, have been significant. Those costs should be evaluated by comparison to continuous, systematic and fair enforcement of the various laws. We believe the Division of Law Enforcement ought to break out the costs for this operation which with a little effort they should be able to do, even if their current accounting practices document their funding in other ways. (See Appendix A).

This Subcommittee should evaluate as well the abuses of civil rights which can occur in a sting-type operation. The attachments in Appendices B and C will give the Subcommittee some idea of the overzealousness of some law enforcement agencies in carrying out their duties.

An aspect of the controversy surrounding Operation Falcon has been the dispute as to the number of birds involved. We have relied on information supplied to us from public sources. The Service, without public release of documentation, suggests that many more birds than those confiscated were involved. The National Audubon Society, through its spokesman, Mr. Amos Eno, issued a press release almost simultaneously with the Service's on June 29, 1984. National Audubon's press release expands and exaggerates further the allegations made by the Service. Mr. Eno admitted, however, during a telephone interview with Alaska Public Radio that some of the numbers used in the Audubon release were basically his own estimate.

Audubon continues to suggest a number of birds involved which is different than the number used by our Association or the Service. Nevertheless, on two occasions Mr. Eno claimed to have "complete" files on all the cases, which if true suggests complicity with the Division of Law Enforcement, because no other group has "complete" files. We cannot make any judgment about the conflicting numbers unless we, too, are provided access to the files. We question the propriety of allowing Audubon access to that information until it is released publicly.

Also, the North American Falconers Association is very concerned about the confiscated birds still held by the Service. A few of the birds which have been returned were in very poor physical condition. Originally the birds were kept in overcrowded facilities which did not meet the standards that we, as falconers, are required to maintain. Nevertheless, the remission process proceeds unnecessarily slowly. In some cases the Service simply has not moved forward to complete the process.

Finally, Operation Falcon is partially the reason given for a complete review of the regulations governing falconry and captive propagation published in the Federal Register on January 4, 1985. (50 F.R. 518) There may be some need to amend the various regulations to accommodate changed circumstances, but if in fact the Service is managing by objective, then the public needs to be supplied with background information in order to make a meaningful comment. The North American Falconers Association, through its President, Mr. James Weaver, has requested background information to assist in the evaluation of the need to revise existing regulations. (See Appendix D). We believe the background information requested would be useful to this Subcommittee in order to evaluate the legislation now before it.

The North American Falconers Association does not oppose the use of "sting" type operations as an effective law enforcement exercise. We believe, however, that Operation Falcon continued beyond a reasonable time and that the Service went to extreme lengths to involve people based on allegations unsupported by reliable evidence. To minimize problems associated with "sting" type operations, we ask that this Subcommittee urge the Service to adhere to the U.S. Attorney General's Guidelines for Undercover Activities and the Use of Informants and Confidential Sources. These Guidelines provide the Service leadership the opportunity to oversee and review law enforcement activities.

COMMERCIALISM

The North American Falconers Association supports commercialism in captive bred raptors species, because it encourages captive propagation and thereby diminishes the temptation to take wild birds illegally. With the massive releases of captive bred peregrine falcons for conservation purposes, we see a rapidly expanding wild population undiminished by this small but abhorrent illegal harvest. As more private projects produce captive bred falcons at an ever decreasing cost, the supply of birds for recreational purposes should be satisfied.

Most importantly, private breeders are the sole suppliers of captive bred falcons for conservation efforts in some states. Many of these birds are donated in order to assist efforts to reintroduce the species in the wild. The Raptor Exemption makes these releases possible. We understand some states are exploring cooperative agreements with private projects for a supply of captive bred falcons to aid in conservation efforts.

Many private breeding projects have added peregrine falcons to their inventory since the passage of the Exemption. The private projects, therefore, avert further the possibility of catastrophe to the species through disease, fire, or other destruction at one of the institutional facilities. In the event of a disaster at the Peregrine Fund, for example, the peregrine falcon recovery effort would be set back a decade were it not for the possibility of obtaining birds from these private sources.

We must assume that at some future time The Peregrine Fund and others will cease their large scale efforts. Yet there may be a continuing need, albeit smaller, for falcons to be used for introduction to the wild in some states. Obviously the private projects can satisfy those needs.

The recovery effort on behalf of peregrine falcons has been the most successful of all endangered species projects. Dr. William Burnham, during the March hearings before this Subcommittee, testified as to the significance of private propagators in the recovery effort. That recovery combined the abatement of organo chlorine pesticides with the massive releases of birds to produce such a success. Nevertheless, we must admit that the wild population is fragile. Therefore, we believe it would be in our national best interest to have a pool of birds in private projects should a disaster reoccur.

Since more people are currently engaged in captive propagation, we have increased dramatically our scientific knowledge of the habits of raptors. For example, private breeders have been innovative in discovering new methods for cooperative artificial insemination, raising newly hatched young, and for developing modification to incubation technology.

Finally, the Raptor Exemption has facilitated the movement of birds in emergency situations in the recovery effort. When the institutional breeders lack space, or when a bird is no longer desirable for propagation, these extra birds can be handed over to falconers or private breeders to complete a useful life. None of this would have been possible without the 1978 Raptor Exemption.

Many of the above activities will continue to be permitted by this legislation. However, the principle focus of these private breeding projects is to supply falcons for falconry purposes. As proposed, this legislation will cause private breeding projects to limit raptor propagators to supplying birds for governmental needs. Most breeders will cease producing enough birds to assist the conservation program. We do not believe that is the intent of the sponsor of this legislation. Finally, in the interests of the conservation of the peregrine falcon it is important to have a commercially reasonable means of exchanging captive bred peregrine falcons among falconers.

We respectfully urge this Subcommittee to maintain the 1978 Raptor Exemption as written. Amendments to or rescission of this successful Exemption are not warranted by the record.

THE COSTS OF OPERATION FALCON

The Subcommittee should balance whether "sting" type operations justify their costs when compared to efficient, continuous law enforcement. This Subcommittee should determine what the true costs were for Operation Falcon. The following must be considered:

- A. Biological impact on the natural resource and the justification for the taking of wild peregrine falcons and gyrfalcons for the sting part of Operation Falcon.
- B. Direct costs for the sting part of Operation Falcon:
 - 1. Law Enforcement Agent time;
 - 2. Payments including reimbursable expenses, to John Jeffrey McPartlin;
 - 3. Funds directly allocated to the McPartlin program;
 - 4. Costs of taking birds from the wild by McPartlin and Law Enforcement Agents;
 - 5. Cost of acquisition of birds from captive sources; and,
 - 6. Cost of transportation and other costs for moving birds for sting activities.
- C. Direct costs for the investigation, indictment, search, and arrest part of Operation Falcon:
 - 1. Agent time spent at investigation;
 - 2. Cost of preparation of affidavit and cases for indictment;
 - 3. Number of and costs for agents, including travel and support costs, involved in searches and arrests;
 - 4. Number of and costs for attorneys from the Departments of Interior and Justice;
 - 5. The costs of settling the plea bargains and the costs of trial;
 - 6. The costs of defending suits against principals and agents of the Fish and Wildlife Service as a result of Operation Falcon;
 - 7. The costs of the remission proceedings to settle the legal status of each bird held; and,

8. Costs incurred due to delay or blocking of remission proceedings by unknown officials.
- D. Direct costs for the holding of confiscated birds:
1. The costs of transportation to and care of each bird at the Montana holding facility;
 2. The cost of construction of the facility;
 3. The costs of transferring, housing and maintaining birds at facilities in other states;
 4. The costs for veterinary services;
 5. The costs for recordkeeping on each bird; and,
 6. Who will bear the above costs of confiscated birds if those birds are returned to the people from whom they were taken.

Appendix B

On Friday, June 29, 1984 at 6:00 AM, five Federal Fish and Wildlife and California Department of Fish and Game investigators visited my home in Lafayette.

Upon their arrival that morning, my family and myself were in bed and asleep. When I opened our front door, they demanded that I show them my raptors, facilities and records. I politely asked them if they could please wait until 8:00 AM (the time we usually arise) when my family could be dressed and presentable. They responded that they were in a hurry and must do this inspection now. I said I would be glad to let them walk through the house to closely inspect my raptors in the backyard (the only easily accessible entrance to my backyard is through the house) at a reasonable hour and when my family was up. I also told them that I had nothing to hide and was legal. At that time they made the accusation that I was not legal and was in violation of the law, because they could see an unbanded, mounted raptor through the window. I showed them that this alleged "illegal mounted raptor" was a ceramic figurine of a Goshawk.

They continued to demand entry into the house so they could inspect the bands on my birds in the rear courtyard. All of the birds in the courtyard were visible through the large picture windows next to the front door. I told them my falconry license and breeding permit both state that inspection may be at any reasonable hour, and 6:00 AM was far from a reasonable hour for my family and myself. They said they felt this was a reasonable hour and if I denied them entrance to my home and backyard they would have both my breeding permit and falconry license revoked. They also took many pictures, including shots of my wife and myself in our night clothes, without our permission.

I agreed to show them (at 6:00 AM) all raptors, facilities and records they wanted to see provided they didn't have to enter the house and disturb my family until at least 8:00 AM. I then proceeded to show them all my records, breeding facilities and two of my eight raptors, plus answered all of their questions. I even obliged them by bringing a falcon that they requested to see from the backyard, through the house and out the front door for them to observe closely.


They still kept insisting on their entering the house to view the remaining six birds and their bands. I again suggested they wait and watch the birds until 8:00 AM or return in the afternoon when I could meet them after work. They continued their threats of revoking my permit and license if I didn't let them into the house before 8:00 AM. They also inferred that I knew of illegal dealings with raptors and that I might have been involved with these dealings.

I have had a life-long love and dedication for raptors and other wildlife. I have been a falconer for thirty years and a raptor breeder for over ten years. I produced the first captive bred falcons to be intentionally released back to the wild in California and have so far produced more captive bred falcons for breeding programs, falconry and wild release than any other individual in California. I have also been involved with many educational programs

John A. Bean 7/27/84

for both federal and state agencies, including holding a voluntary position as a raptor advisor to the California Department of Fish and Game. I have never received any monetary gain for my investments in time and monies for these endeavors, but I have received a lot of personal satisfaction to see my efforts pay off for those that I love—raptors.

I have always prided myself in being fair and helpful with law enforcement agencies in the past. I have a great respect for raptors; their conservation and safety. Because of this, I was upset, enraged and abashed at this intimidating and unreasonable disturbance by this attempted invasion into my home at such an early hour.

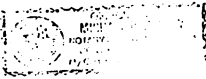

 Gary A. Beeman

777 Moraga Road
 Lafayette, CA 94549

July 27, 1984
 Date

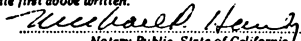
NOTARY PUBLIC:

STATE OF CALIFORNIA
 COUNTY OF CONTRA COSTA ss.



On this 27 day of JULY in the year one thousand nine hundred and 84 before me, MICHAEL P. HANLEY, a Notary Public, State of California, duly commissioned and sworn, personally appeared GARY A. BEEAMAN PERSONALLY known to me to be the person whose name I subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the CALIFORNIA County of CONTRA COSTA the day and year in this certificate first above written.


 Notary Public, State of California
 My commission expires 4-15-88

INFORMATION SUPPLIED BY

CHARLES E. ROBINSON
208 Gardner Avenue
Burlington, Wisconsin

Persons referred to in statement:

Ernest H. Mayer
Supervisory Special Agent
Division of Law Enforcement
U.S. Fish and Wildlife Service
6006 Schroeder Road
Madison, Wisconsin 53711

Barbara A. Wolf
Conservation Warden
State of Wisconsin
Box 141B
Kansasville, Wisconsin 53139

Gus W. Ernst
Conservation Warden
State of Wisconsin
2300 N. Third Street
Box 12436
Milwaukee, Wisconsin 53212

Maureen Robinson (Wife)

VISIT BY LAW ENFORCEMENT TO CHECK BIRDS & BAND NUMBERS

The following notes were made on July 3 dealing with the investigation made at 208 Gardner Avenue on Saturday, June 30, 1984, starting at 4:15 p.m.

NOTE: The written narrative does not relate the heated, adversarial and threatening nature of the questioning which was conducted during the visit described below.

1. C. Robinson was in the back yard getting ready to leave the house to go to the farm in order to take care of his birds.
2. Three people approached him and said that they would like to talk to him about his birds. These three people were Ernest H. Mayer - SAC, Barbara Wolf - DNR, and Gus Ernst - DNR.
3. CR asked them what they wanted.
4. SAC said he wanted to check my birds and their band numbers.
5. CR immediately obliged and first took a large female Redtail out of her free-flight chamber.
6. SAC asked if it was a male Redtail. Ventis is an unmistakable huge female, immediately recognizable by anyone knowledgeable about raptors.
7. SAC then read the band number and wrote it on an 8 1/2 X 11 sheet of paper together with the female sign, using a brush pen.
8. BW took a flash-bulb Polaroid picture of the setup directly into the face of the bird with CR holding the bird.
9. CR then took everybody to the other side of the house where two falcons were perched.
10. CR asked SAC and DNR if they knew the species of birds.
11. BW knew the Lanner from previous visit but SAC and GE did not. None of the three were able to identify the Prairie.
12. SAC said he had been attacked by a bird like that (Prairie) after he took her off infertile eggs for a band check. The bird went for him as he left.
13. Maureen remarked that the bird would be upset and probably stop incubation.
14. SAC replied that it did not matter since all birds were to be checked no matter what.

15. BW again took flash-bulb pictures directly into the faces of these two falcons after SAC read the band numbers and so noted same on 8 1/2 X 11 sheets of paper.
16. CR held the birds in all picture taking.
17. CR then invited all into dining room. At first only SAC came in.
18. CR returned to the back door and again asked the two DNR and MR in. They seemed reluctant but did come in.
19. MR sat in to observe.
20. CR told SAC that he had seen on NBC News the night before an item about a big bird bust.
21. CR told SAC that he had recognized one of the people ^{Walker} ~~(name)~~ on TV from Illinois.
22. SAC said he was one of the biggest dealers involving millions of dollars in the exporting and illicit trafficking of birds of prey.
23. SAC said several falconers were on the USFWS payroll for three years and they were going to clean up falconry.
24. SAC said Cornell was involved in marketing raptors. He said the government had wasted \$172,000 on Cornell and they would close them down.
25. SAC then pulled out a multi-page questionnaire and started to read from it, making notes as he went.
26. QUES The questionnaire was lengthy so it is necessary to paraphrase the specific questions which were directed at Cornell as follows: Did you every buy a bird? Do you know anyone who has ever bought or sold a bird? How much money did Cornell want for a bird? What was the minimum amount of money you had to pay Cornell for a bird? Do you know anyone who got a bird from Cornell?
27. SAC then asked CR to sign the questionnaire that SAC had made notes on.
28. CR said that he wanted to read the questionnaire first so SAC gave it to CR to read.
29. CR read SAC questionnaire and asked for a copy.
30. SAC said that he had no copy for CR.

31. CR then said that he would not sign anything for which he had no copy.
32. SAC -then told CR that he was being uncooperative and was obstructing justice by delaying him.
33. CR said that we could get a photocopy downtown.
34. SAC said that he had no time to go running all over town. He again pressed CR to sign.
35. SAC continued the pressure and insidious threatening by claiming that CR was obstructing his investigation.
36. CR told SAC that he was threatening and intimidating.
37. SAC denied it and CR repeated same.
38. CR asked MR to call DF (legal counsel)
39. CR briefed DF on the visit and questionnaire and then asked DF if he should sign.
40. DF said, "No way," and asked CR if he wanted him to come over.
41. CR said "yes" and DF said he would be there right away.
42. CR told SAC that my legal counsel was on the way over whereupon SAC became upset.
43. SAC accused CR of stalling and obstructing his investigation. He then said that he would give counsel only five minutes to get there since he had to go on to other sites and continue his investigation.
44. SAC then asked CR for his records.
45. CR asked, "What records?"
46. SAC said the records required by regulations to comply with the law.
47. CR again asked what records.
48. SAC then told CR that he was violating the federal regulations and obstructing his investigation by not cooperating.
49. CR then excused himself to go to get something from the van.
50. CR returned with a tape recorder and placed it on the dining room table.
51. SAC became very upset. He said it was a violation of federal statutes and federal law to tape record our conversation and ordered CR to turn it off or he would leave.
52. CR was not sure so he turned the tape recorder off.

53. SAC again asked for CR's records.
54. CR then went to the TV room to get his records and relative correspondence.
55. SAC followed CR when he went to get his records. SAC remarked that CR had some nice decoys and statues.
56. CR then asked what specific records he wanted.
57. SAC was not specific so we repeated two more times lines 114 through 56, already noted.
58. CR again reminded SAC that he was threatening and intimidating CR.
59. SAC then told CR that he would be very specific and tell CR what he wanted.
60. SAC then started thumbing through several sheets of paper (supposedly the regulations). SAC continued thumbing through the pages and not finding what he had wanted.
61. CR started to count the page flips after SAC had been doing it for a few times. CR counted at least 12 page flips.
62. SAC then said he could not find what he wanted so that he could not quote directly since the regulations were not with him and he did not want to give wrong information.
63. CR showed him permit numbers for both falconry and propagation.
64. DF arrived about 5:00 p.m. and asked to be filled in.
65. SAC said that he was there to talk to CR about his bird business.
66. DF interrupted and said that this was a hobby and a sport and not a business.
67. SAC became very excitable and said that he had a right to come in any time he chose and check the birds and records as he wished.
68. SAC said that he was not interested in semantics.
69. DF reminded SAC that the words used were his and that CR had a right to an attorney.
70. SAC said that he had a lot to do yet and that we were delaying him, so he went out the front door with the two DNR.
71. SAC then came back and said that he would forget the records if he could complete the bird check.
72. DF took SAC's name as well as the name of his superior.

FARM

73. SAC, DNR, MR & CR went to the farm. Bird band numbers and pictures were taken of the two peregrines, the goshawk, and the redtail. The pictures were shown to CR.
74. Their business seemed to be over so CR offered to show them all the facilities.
75. They visited the pigeon coop as well as the quail- and mouse-raising facilities.
76. CR then offered to show SAC and DNR the new house that was being built. They all spent some time going through every room and they liked the view.
77. SAC then suggested to DNR that they meet downtown and that he would buy.
78. They left about 6:00 p.m.

COMMENTS

1. My civil rights were violated by the insidious threats made by SAC, suggesting that I was obstructing justice, as noted in lines 32, 35, 48, 51, and .
2. SAC tried to deny me legal counsel by suggesting that I was not cooperating and that he was going to leave after he found out that counsel was on the way over. See lines 42 → 43
3. SAC denied my rights to do as I wished in the house in an attempt to get precise documentation with a tape recorder by claiming it was against the law as noted in lines 50 → 52
4. SAC was clearly fishing for information for which he had no specifics when I realized that he could not tell me what specific records he wanted to see. He was simply using the band check feature on the permits to come upon my premises and make broad claims without knowing specifics. Lines 44 → 62

OBSERVATION

SAC knew he lied to me and misrepresented himself since he clearly wanted to get together with the DNR downtown over coffee after he left my premises. See line 43.
and 77



159 Sapsucker Woods Rd.
Ithaca, New York 14850
15 May 1985

Director (LE) USFWS
P.O. Box 28006
Washington, D.C.

Subject: Public Comment/Review
Raptor Regulations
50 CFR Part 21
50 FR 518 & 50 FR 4877

Dear Sir:

Given that there were no limits set forth with respect to the comment requested on 50 CFR 21.28, 21.29 and 21.30, we request that the comment period be held open until the information requested below is published in the Federal Register. We find it nearly impossible to make any rational comment or offer any constructive suggestions without such basic information. Much of the following comment, therefore, seeks to elicit information with respect to the falconry regulations, the raptor propagation regulations, the status and dynamics of raptor populations, the net impact of falconry and raptor propagation on wild populations, and the assessment of current raptor regulations.

The North American Falconers' Association is disturbed that the FWS notice offers no explanation as to the purpose of the review. In 1973 and 1974, the public was provided 120 days to comment on the proposed falconry regulations. In 1983, an additional 92 days were provided for public comment on these regulations and the newly proposed raptor propagation regulations. Combined, more than 16,000 comments were received by the FWS during the 7 months of comment period. The only official statement relating to a need for review concerns a provision to allow for the commercial export of certain raptors as stated in the preamble to 50 CFR 21.30 in 48 FR 31603. We surmise, however, that this is not the only reason the public comment has been solicited. The 29 June news release implies that Secretary Clark ordered such a review to be based on illegal activities uncovered by the Service through Operation Falcon. This supposition appears to have merit based upon recent discussions with FWS staff who have indicated that this action is required by an internal Department directive.

We have always welcomed every opportunity to cooperate with the FWS on matters relating to development of effective and equitable raptor regulations. We regret, therefore, that the FWS has chosen not to officially identify the purpose for this current review to the extent that this lack of candor reduces the value of our comments.

Our comments support the need for a broad scientific review of all Federal raptor regulations as they may pertain to the management of the wild resources of the United States and the maintenance of falconry as a high quality recreational activity. We will support whatever action is appropriate to bring existing regulations more in line with the needs of the resource and falconers. This review must be objective and withstand the rigors of scientific scrutiny. To that end, we would encourage the FWS to invite such professional organizations as the American Ornithologists' Union to convene a panel of experts comprised of leading ornithologists who are knowledgeable about raptor populations, management of renewable resources, and the practice of falconry to oversee the FWS review. NAFA will fully cooperate with all parties involved. A number of salutary benefits will likely accrue from such an objective review:

- (a) Reduction in the administrative burden on wildlife agencies, falconers, and raptor breeders through the elimination of those regulations that serve no significant benefit to the resource or the public;
- (b) Redirection of agency priorities and public monies to those activities of greatest benefit to the conservation of wild raptor populations; and
- (c) Promotion of better cooperation between public agencies and raptor users that can only lead to better raptor management and the perpetuation of falconry as a traditional and proper use of this resource.

The essential element of the review must be directed towards assessing the impact of falconry and raptor propagation regulations on wild raptor populations in the U.S. Prior to the establishment of the final regulations, the FWS did conduct an assessment of the proposed falconry regulations (January 1976), and proposed raptor propagation regulations (September 1982). While these earlier assessments were comprehensive, they could not evaluate the final rules which in part differ from the proposed action. The Service now has considerable new information resulting from the records of permittees submitted to the agencies, the records generated by Operation Falcon, and the status of raptor populations in the wild. In light of statements made by the FWS that the illegal activity associated with falconry and captive breeding poses grave threats to wild raptors, a thorough and scientific review is both timely and, in our estimation, imperative. We recommend that the following items be critically determined and evaluated as an integral part of the study:

Falconry Regulations

Numbers of licensed falconers in the U.S. by permit class by State, and trends in numbers of falconers during the last decade.

Numbers of raptors lawfully taken from the wild in the U.S. by U.S. falconers, by species by State during the last 12-month reporting period, and trends in such numbers.

Number of raptors illegally taken from the wild in the U.S. by licensed U.S. falconers by species (subspecies of peregrine), by age when taken, by State for each of the last 5 years. Identify the purpose of this illegal take, e.g. personal falconry use, noncommercial domestic use, commercial export. Additionally, we would like to see the number of licensed U.S. falconers known to have taken one or more raptors illegally from the wild.

Fate of raptors taken from the wild in the U.S. by U.S. licensed falconers during a recent period, e.g. intentionally released falconry birds, rehabilitated, accidentally lost, transferred to raptor propagator, exported, died.

Number of raptors possessed under U.S. falconry regulations that are also possessed under U.S. raptor propagation regulations by species (subspecies of peregrine) by State during a recent period.

Raptor Propagation Regulations

Numbers of licensed raptor propagators in the U.S. by State, and trends in numbers during the last decade.

Numbers of raptors lawfully taken from the wild in the U.S. by U.S. raptor propagators, by species (subspecies of peregrine), by State, by year during the last decade.

Number of raptors illegally taken from the wild in the U.S. by U.S. raptor propagators, by species (subspecies of peregrine) by State, by year during the last decade. Additionally, we would like to see the purpose of the illegal take identified, e.g. personal enhancement of breeding stock, noncommercial transfer, direct (laundering) domestic sale, direct (laundering) commercial export and the number of licensed U.S. raptor propagators known to have taken one or more raptors illegally from the wild.

Fate of raptors taken from the wild in the U.S. by U.S. raptor propagators during a recent period, e.g. transferred to falconers, intentionally released, accidentally lost, exported for nonscientific purposes, died.

Number of raptors possessed under U.S. raptor propagation regulations that are also possessed under U.S. falconry regulations by species (subspecies of peregrine) by State during a recent period.

Status and Dynamics of Raptor Populations

Numbers of raptors by species (subspecies of peregrine) of significant falconry interest in the U.S. during recent years. These estimates should include the number of young produced per year that fledge, migrate through, and/or winter in the U.S. as well as the number of breeding pairs represented by that annual production.

Numbers of raptors that die during their first year of life by species of significant falconry interest. These mortality figures should be broken down into 2 categories; natural causes, e.g. starvation, predation, disease, collisions with natural objects and those attributed to man, e.g. illegal shooting, accidental trapping, lead poisoning, electrocution, collisions with man-made objects, scientific collecting, illegal pet keeping, die as the result of taking for falconry and captive breeding.

Net Impact of Falconry and Raptor Propagation on Wild Populations

Direct losses/benefits, e.g. number taken from the wild vs. number lost or released to the wild, evidence that natural ecosystems are being enhanced/degraded by these activities.

Indirect losses/benefits, e.g. enhanced management of wild populations through scientific studies of captives, evidence that illegal demand for wild raptors is increasing owing to popularity of falconry, greater public support for raptor conservation programs.

Assess Current Raptor Regulations

Determine the causes and magnitude of violations, both those attributed to flaws in falconry/propagation regulations and those unrelated to these regulations.

Determine the adequacy of current falconry/propagation regulations. Is there a need to strengthen the regulations in order to protect wild populations from endangerment, and are there opportunities to liberalize and thereby, reduce the burden on permittees and wildlife management agencies.

The North American Falconers Association realizes that such a review would be time consuming. The data are available now, however, as a result of current regulations. Not to make use of this information prior to any suggestion of changes in the regulations would be a disservice to State agencies, falconers, raptor propagators and others who were required (by law) to provide records of all raptor related activities. Again, we request that the review period be held open until the results of such a study are made public and that current regulations remain in effect during the interim.

However, if, for some reason, the Service is unable to provide the needed information, we would like to request that the following regulatory changes be adopted to bring the raptor regulations more in line with the needs of the wild raptor resource and the public. Needs which, The North American Falconers Association feels, would be substantiated by the aforementioned scientific study.

Falconry Permit Regulations

Amend 50 CFR 21.28(c,d). We suggest that the States be authorized to act as agents of the FWS for the purpose of issuing Federal/State falconry permits and administering regulations within the regulatory frameworks established by the FWS. This would allow for more timely issuance of permits and reduce costs by eliminating the necessity of Federal review and action on permit applications.

Amend 50 CFR 21.29(g)(1)(i). We suggest that falconers be authorized to house more than one untethered raptor in a common space. Current regulations require that all raptors be separated from one another. This restriction is unnecessary for many captive raptors, and results in a burdensome situation that effectively prohibits the permittee from enhancing the compatibility of raptors which hunt together and testing the potential of stock for captive breeding.

Amend 50 CFR 21.29(g)(1)(ii). We suggest that this section read as follows: Outdoor facilities (weathering area) shall provide protection from excessive sun, wind, and inclement weather. Adequate perches shall be provided.

Amend 50 CFR 21.29(g)(2)(iii). As a means of avoiding a misunderstanding, we suggest that this section should read: Bath container--At least one suitable container.

Amend 50 CFR 21.29(g)(4). We suggest that the 30 day limit be deleted. This would eliminate any problems that might be caused by extended travel requirements.

Amend 50 CFR 21.29(j)(4). We suggest that the 30 day limitation be changed to 6 months and that an explanation not be required.

Amend 50 CFR 21.29(h)(2). We suggest that the Service delete the marking requirements for all species not listed as Threatened or Endangered, not eligible for sale, nor of special management concern. We feel that the administrative costs associated with the marking and subsequent maintenance of records for the common species is difficult to justify as a benefit to the wild populations.

Amend 50 CFR 21.29(i)(4). We suggest that Master Class falconers be authorized to take raptors listed as threatened under a Depredation or Special Purpose Permit in accordance with 50 CFR 21.29(e)(3)(v). This change will bring the depredations take provision in line with the Master Class falconer requirements.

We urge the Service to authorize a limited annual harvest of wild peregrine falcons under 50 CFR Part 13 as provided by 21.29(e)(3)(v). The FWS has stated that, "there is a large number of Falco peregrinus being produced in northern North America in recent years: Certainly more than several thousand and possibly as many as 22,000. The precise number is not germane beyond demonstrating that this bird is not now in danger of extinction" (48 FR 8797). The FWS has also assessed the biological impact of such a harvest and concluded that, "an annual take of 60 to 100 first-

year migrant peregrine falcons for the purpose of falconry, will not jeopardize the continued existence and recovery of the Arctic or American peregrine falcons in North America" (Trial Section 7 Consultation, June 15, 1984). This action would allow wildlife agencies to meet their responsibility to the public by basing programs on the scientific management of renewable resources.

Amend 50 CFR 21.28(f). We suggest that the duration of falconry permits be extended to 5 years, but that annual activities reports still be required. This will reduce administrative costs and burdens on both agencies and permittees with no risk to the resource.

During the past few years the tremendous increase in the numbers of raptor rehabilitation projects has not gone unnoticed by members of NAFA. At the present time many of these projects are no more than "dumping" grounds for raptors and other wildlife that State and Federal agencies have no time for. Inasmuch as there are no established guidelines under which these facilities must operate, and recognizing that some fail to meet even minimal humane standards, we urge that regulations be promulgated to assure that these birds enjoy the same standards outlined in 50 CFR 21.30(d)(1) (i)(11).

In regard to National direction, NAFA suggests that the FWS encourage all falconry States to provide for the legal take of raptors by licensed falconers in a manner consistent with the harvest of game species by nonresident sportsmen. These enhanced opportunities for nonresident take would provide increased State revenues through permit or license fees, reduced need for extraordinary law enforcement operations by allowing legal harvest, and provide for a legitimate take of a migratory bird resource shared by all states in common.

Captive Propagation Regulations

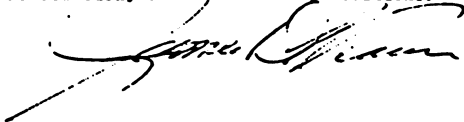
These regulations have been in full effect for only one year, hardly time for a test of their effectiveness. We recommend that substantive changes not be considered at this time with the understanding that a review be initiated late in 1988.

Endangered Species Act

The North American Falconers Associations remains strong in its stand against any changes in the raptor related provisions of the ESA.

This concludes our comments. We wish to thank you for the opportunity to make these comments and to present our opinions on this subject. We look forward to working closely with the Service in the near future to assure the best possible regulations for all parties concerned.

Submitted on behalf of the Board of Directors and the membership of The North American Falconers Association, James D. Weaver, President.



Mr. BREAUX. Thank you very much for your presentation. Next, we will take Mr. Stan Senner.

**STATEMENT OF STANLEY E. SENNER, EXECUTIVE DIRECTOR,
HAWK MOUNTAIN SANCTUARY ASSOCIATION**

Mr. SENNER. Thank you, Mr. Chairman.

It is a pleasure to be here on behalf of the Hawk Mountain Sanctuary Association to present our views on H.R. 2767. I will also summarize my remarks and have submitted a statement for the record.

It is our understanding that the purpose of H.R. 2767 is to modify the raptor exemption to make it illegal to sell raptors except for sales to Federal or State agencies or private entities participating in recovery programs approved by the Secretary. The intent of the legislation is not to repeal the exemption but to modify it with respect to commercial sales. We support that intent, and we thank Congressman Lent for introducing the bill. We would suggest that the members of the subcommittee consider also prohibiting exports and imports.

Before discussing our reasons for taking this position, let me just very quickly note our position on two related issues, falconry and Operation Falcon. First, our organization does not oppose falconry consistent with Federal or State law. We recognize that falconers in general have made significant contributions to the conservation of birds of prey.

Indeed, we have many friends and cooperators in the falconry community. We often rely on them for advice about the care of injured or captive raptors. Our reliance on some of those individuals includes representatives of organizations at the table here, and, of course, Dr. Cade is a long-time friend and associate of our organization.

Regarding the second matter, Operation Falcon, it is indeed unfortunate that people and organizations interested in raptors are somehow sharply divided into those that are for or against this operation. We deeply regret that the discussion of the substance of the issue has degenerated into a matter of personalities and emotional rhetoric.

Our position is very simple. We think that people who violate the law should be prosecuted fully. And we will not second-guess the judgments and actions of the Fish and Wildlife Service or the Canadian Wildlife Service while this operation is, in fact, still ongoing.

Our opposition to commercial sales of captive-bred raptors predates Operation Falcon. We are on record in opposition to the regulations allowing commercial sales adopted by the Service in 1983. While your subcommittee's concern is the raptor exemption and those species covered by it, we remain opposed to commercial sales of any raptor species, endangered or otherwise, whether bred in captivity or caught in the wild.

We are opposed to sales for profit of native, migratory birds. Fixing a price tag on a peregrine or any other bird and allowing someone who has had the privilege of keeping such a bird to profit from its sale is repugnant to us. It is demeaning to the bird, and it

is reducing a priceless part of our natural heritage to the level of a commodity.

The Migratory Bird Treaty Act prohibits trade in migratory birds unless specifically excepted by regulation. So far as I know, the only other migratory birds for which trade is allowed are certain captive-reared waterfowl. Many of those, I suspect, are domestic mallards which are sold for consumption or shooting at controlled preserves.

The excesses of plume and market hunters, of course, stimulated the ban against commercial sales in the Migratory Bird Treaty Act, but we also take it as a statement of philosophy that birds are a publicly owned resource that should not be bought and sold. And in the absence of a compelling case to allow commercial sales, we see no reason to make an exception in the case of the peregrine or any other raptor.

Proponents of commercial sales argue that the regulations allowing trade have not been in effect long enough to evaluate them fairly. We, on the other hand, do not think that there was sufficient evidence to warrant adopting the regulations in the first place.

Captive breeding projects, whether at the Peregrine Fund or undertaken by individuals, contributed many birds to recovery programs prior to the 1983 regulations. It was a labor of love, as Mr. Berry said earlier, but in spite of much red tape and a lack of funds, a great deal was accomplished without benefit of regulations allowing commercial sales. One of the reasons it worked was because of the reservoir of moral and financial support generated by friends of birds of prey who fell in love with these birds at places like Hawk Mountain.

It is, therefore, hard for us to accept the notion that modifying only one aspect of the current law, that pertaining to commercial sales, will negate the progress that has been made and is being made. If the ability to be compensated for one's expenses while raising raptors for recovery projects is the problem, then Congressman Lent's legislation addresses that problem by allowing sales to public or private entities engaged in approved recovery programs. We think this is an excellent compromise. And I would ask whether having the ability to make a profit by selling and exporting an endangered species to the Saudis, for example, is necessary to advance raptor conservation in North America?

It has been pointed out that most peregrines produced in captivity have come from the Peregrine Fund, and we have also heard that much of the stock produced by the Fund is derived from birds contributed by private breeders. It seems to me that the central question is not who produced what in the gross sense, but more specifically, who is producing birds for release in legitimate, planned recovery projects?

Further, I would raise another question, and that is simply that under a system allowing sales for profit, what is the incentive for private breeders to produce a substantial number of peregrines for release when they can make top dollar by selling those same birds to someone else who badly wants to own a peregrine?

It is important to note that entirely aside from the matter of commercial sales, the 1983 regulations implementing the exemp-

tion greatly benefitted falconers and breeders by establishing uniform standards and procedures and by allowing them to operate under permits issued under the authority of the Treaty Act. These improvements, which have facilitated the propagation and reintroduction of the peregrine, are not jeopardized by Congressman Lent's bill. Again, it only addresses commercial sales and, in our view, the case has not been made that commercial sales are crucial to conservation efforts.

There is also the matter of whether commercial sales in fact reduce pressure on wild populations. This is often asserted to be true, but we would ask, what is the evidence? It seems here that a key consideration is the value of captive-bred stock versus that of birds that were raised and are competing and surviving in the wild. If captive stock becomes widely available, will legitimate falconers and breeders, to say nothing of those few who willingly disregard the law, suddenly lose interest in wild stock? We doubt it.

Falconers routinely trap hawks in passage, train them, fly them for a year or two, and then release them or give them away. Part of the reason is that after awhile, they seem to lose a spark that is present in the more recently trapped bird. Wild stock are also valued for their genetic vigor and will always, I suspect, command higher prices than captive-bred birds, particularly after a number of generations of breeding in captivity.

Most of the violations revealed in operation falcon apparently predate the 1983 regulations, but the results of the sting made public to date suggest there is a willingness to circumvent the law, including laundering of wild birds through captive-breeding projects, and that there is a market.

The Canadians have allowed sales for several years. Is there evidence that those sales have reduced pressure on wild populations in Canada? We do not have the answer to that question. Perhaps the gentleman from the U.S. Fish and Wildlife Service might have some information there. But we think it relevant that the Canadian Wildlife Service had their own version of operation falcon, and it included a number of cases where eggs or young were taken from the wild and, again, laundered through captive-breeding facilities.

Some people have argued that to repeal or modify the exemption would only curtail the activities and rights of law-abiding falconers and breeders. There will always be peregrines taken from the wild. Historically, this has been the case, and there is no reason to think that things will change. The question is, though, by allowing sales for profit and such other activities as exports, are we increasing the incentive to break the law? Moreover, no one has the right to sell migratory birds, much less endangered species, and a ban on commerce is a central element in an array of laws intended to protect wildlife.

In summary, there has been a great deal of progress in the art and science of breeding raptors. These advances have benefited conservation programs. There have also been advances on the regulatory front, in part from those 1983 regulations.

However, we do not find that buying and selling peregrines or other raptors is critical to conservation efforts, nor is the ability to export them. We also think that commercial sales do create an incentive to abuse the law. At heart, however, we state again a philo-

sophical objection to treating our native avifauna as commodities in the marketplace, and we have yet to see compelling evidence that to do so is in the best interest of the resource.

I would add that I think there are some differences between commercial sales of peregrine falcons and sales of a fur-bearer or an alligator where the object of the sale is to have the skin which is not damaged by or is not devalued by raising that animal in captivity. In the case of falcons, we are talking about birds that are desired for their wild qualities, the ability to fly and hunt. I think there is a special value that will always be attached to a bird originating in the wild.

Again, we support the intent of H.R. 2767, that is, to prohibit sales except as part of an approved recovery project. We encourage the members of the subcommittee to also consider restricting exports.

Thank you, again, for the opportunity to testify and for holding this hearing.

[Prepared statement of Mr. Senner follows:]

PREPARED STATEMENT OF STANLEY E. SENNER, EXECUTIVE DIRECTOR, HAWK MOUNTAIN SANCTUARY ASSOCIATION

My name is Stanley E. Senner, and I am the Executive Director of the Hawk Mountain Sanctuary Association. Mr. Chairman and members of the Subcommittee, I am pleased to be here today on behalf of the Association to present our views on H.R. 2767, a bill to amend the Endangered Species Act with respect to the sale of raptors bred in captivity. We thank Congressman Lent for introducing this legislation, and we support its intent.

By way of background, the Association is a nonprofit, tax-exempt educational organization. Our mission is to foster the conservation of birds of prey and other wildlife and to create better understanding of the environment. We maintain a 2,000-acre sanctuary (established in 1935) in the Appalachian Mountains north of Reading, Pennsylvania, and our program in education, research, and conservation is international in scope. Each year the Sanctuary is visited by about 50,000 people, most of whom come in the autumn to watch spectacular flights of birds of prey migrating overhead. Our 6,500 members and thousands of visitors come from all 50 states and many foreign countries.

The purpose of the raptor exemption in the Endangered Species Act was to exempt from the prohibitions of the Act, including the prohibition on commercial sales, those birds held in captivity prior to the date of enactment. As a practical matter, there is one species at stake here—the peregrine falcon. The Migratory Bird Treaty Act regulates sales of migratory birds generally, and the raptor exemption makes possible the application of the authority of the Treaty Act to the peregrine. Because the welfare of the peregrine was the justification for the raptor exemption, and because it is still an endangered or threatened species, it seems appropriate to address this issue in the context of an amendment to the Endangered Species Act.

It is my understanding that the purpose of H.R. 2767 is to modify the raptor exemption to make it illegal to sell exempt raptors, except for sales to federal or state agencies or private entities participating in recovery programs approved by the Secretary. The intent of this legislation is not to repeal the exemption, but to modify it specifically with respect to commercial sales. We support that intent, although we suggest that exports and imports also be prohibited.

Before discussing why, let me state the position of the Association with respect to two closely-related issues.

First, we do not oppose the practice of falconry consistent with federal and state law, and we recognize that falconers in general have made significant contributions to the conservation of birds of prey. We have many friends and cooperators in the falconry community, and we often rely on them for advice with such matters as the care of injured or captive raptors.

Second, it is unfortunate that people and organizations interested in raptors are sharply divided into camps which are either "for" or "against" Operational Falcon, and we deeply regret that discussion of the substantive issues is now often clouded by matters of personality and rhetoric. Our position is very simple. We think that

individuals who violate falconry and captive-breeding regulations should be prosecuted fully, and we will not second guess the judgements and actions of the U.S. Fish and Wildlife Service and the Canadian Wildlife Service, particularly while the law enforcement effort is not complete.

Our opposition to commercial sales of captive-bred raptors predates Operation Falcon: we are on record in opposition to the regulations allowing commercial sales adopted by the Service in 1983. While this Subcommittee's direct concern is those species exempted by the Endangered Species Act, we remain opposed to commercial sales of any raptor species, endangered or otherwise, whether they are bred in captivity or caught in the wild.

A PHILOSOPHICAL OBJECTION

We are opposed to sales-for-profit of native, migratory birds. Fixing a price tag on a peregrine, or any other bird, and allowing someone who has had the privilege of keeping such a bird to profit from its sale is repugnant to us. It is demeaning to the bird, and it is reducing a priceless part of our natural heritage to the level of a commodity.

The Migratory Bird Treaty Act prohibits trade in migratory birds unless specifically excepted by regulation. So far as I know, the only other group of migratory birds for which trade is allowed is captive-reared waterfowl. Most of those, I suspect, are domestic mallards sold for consumption or for controlled shooting preserves. The presumption against commercial sales of migratory birds resulted from the excesses of plume and market hunters at the turn of the century, but we also take it as a statement of philosophy that birds are a publicly-owned resource that should not be bought and sold. In the absence of a compelling case to allow commercial sales, we see no reason to make an exception in the case of the peregrine or any other raptor.

Proponents of commercial sales argue that the regulations allowing trade have not been in effect long enough to evaluate them fairly. We, on the other hand, do not think that there was sufficient evidence to warrant adopting the regulations in the first place.

COMMERCIAL SALES AND RECOVERY PROJECTS

Captive breeding projects, whether at The Peregrine Fund or undertaken by individuals, contributed many birds to recovery programs prior to the 1983 regulations. It was a labor of love, but in spite of much red tape and a lack of funds, a great deal was accomplished without benefit of regulations allowing commercial sales. One of the reasons it worked was because of the reservoir of moral and financial support generated by friends of birds of prey who fell in love with raptors at such places as Hawk Mountain.

It is, therefore, hard to accept the notion that modifying only one aspect of current law—commercial sales—will negate the progress that has been and is being made. If the ability to be compensated for one's expenses while raising raptors for recovery projects is the problem, H.R. 2767 should solve it by permitting sales to public or private entities engaged in approved recovery programs. We think this is an excellent compromise. Is having the ability to make a profit by selling and exporting an endangered species to the Saudis, for example, necessary to advance raptor conservation projects in North America?

It has been pointed out that most peregrines produced in captivity have come from The Peregrine Fund, and we have also heard that much of the stock produced by the Fund is derived from birds contributed by private breeders. It seems that the central question is not who produced what in the gross sense, but, more specifically, who is producing birds for release in legitimate, planned recovery projects? Further, under a system allowing sales-for-profit, what is the incentive for a private breeder to produce a substantial number of peregrines for release in recovery projects when they can make top dollar by selling those same birds to someone else who badly wants to fly a peregrine?

It is important to note that entirely aside from the matter of commercial sales, the 1983 regulations implementing the raptor exemption greatly benefited falconers and breeders by establishing uniform standards and procedures and by allowing them to operate under permits issued under the authority of the Migratory Bird Treaty Act. These improvements, which have facilitated the propagation and re-introduction of the peregrine, are not jeopardized by H.R. 2767. This legislation only prohibits commercial sales, and, in our opinion, sales are not crucial to the success of conservation programs.

DOES ALLOWING SALES REDUCE PRESSURE ON WILD POPULATIONS

Does allowing commercial sales reduce pressure on wild populations? This is often asserted to be true, but what is the evidence?

It seems that a key consideration here is the value of captive-bred stock versus that of birds that were raised and are competing and surviving in the wild. If captive stock becomes widely available, will legitimate falconers and breeders—to say nothing of those few who willingly disregard the law—suddenly lose interest in wild stock? We doubt it.

Falconers routinely trap hawks in passage, train them, fly them for a year or two, and then release them or give them away. Part of the reason is that, after awhile, they seem to lose a spark that is present in the more-recently trapped bird. Wild stock are also valued for their genetic vigor and will always, I suspect, command higher prices than captive-bred birds, particularly ones produced from generations of captive stock.

Most of the violation revealed in Operation Falcon apparently predate the 1983 regulations, but the results of the sting made public to date suggest that there is a significant willingness to circumvent the law, including the landering of wild birds through captive-breeding projects, and that there is a market for birds originating in the wild.

The Canadians have allowed commercial sales for several years. Is there evidence that these sales have reduced pressure on wild populations in Canada? We do not have the answer to that question, but it may be relevant to note that the Canadian Wildlife Service had their own version of Operation Falcon, including a number of cases where eggs or young birds were taken from the wild and laundered through captive-breeding facilities.

Some people have argued that to repeal or modify the raptor exemption would only curtail the activities and rights of law-abiding falconers and breeders. There will always be peregrines taken illegally from the wild. Historically, this has been the case, and there is no reason to think that things will change, regardless of the law. The question is, by allowing sales-for-profit and such other activities as exports, are we increasing the incentive to break the law? Moreover, no one has a "right" to sell migratory birds, much less endangered species, and a ban on commerce is a central element in the array of laws intended to protect wildlife.

In summary, there have been great strides made in the art and science of breeding captive raptors, and these advances have benefited conservation programs. Such recent regulatory changes as the establishment of uniform standards and procedures for qualifying raptors and issuing permits have also helped. We do not seek to reverse those improvements. However, we do not find that the ability to make a profit buying and selling peregrine falcons is critical to conservation efforts, nor is the ability to export them. We also think that commercial sales and exports create an incentive to abuse the law. At heart, we have a strong philosophical objection to treating our native avifauna as commodities in the market place, and we have yet to see compelling evidence that to do so is in the best interest of the resource.

We support the intent of H.R. 2767 as introduced by Congressman Lent, that is to prohibit sales except as part of approved recovery projects. We also encourage the members of the Subcommittee to consider restricting exports.

Thank you for this opportunity to testify on behalf of the Hawk Mountain Sanctuary Association, and thank you again for holding this hearing.

Mr. BREAUX. Thank you.

Our final witness will be James Leape, Counsel for Wildlife Programs of the National Audubon Society.

STATEMENT OF JAMES P. LEAPE, COUNSEL FOR WILDLIFE PROGRAMS, NATIONAL AUDUBON SOCIETY

Mr. LEAPE. Thank you, Mr. Chairman.

I am appearing today on behalf of the National Audubon Society, the Defenders of Wildlife, the Society for Animal Protective Legislation, and the Environmental Defense Fund to testify in support of H.R. 2767 and, more generally, in support of revision of the raptor exemption.

I would first like to thank Congressman Lent for introducing this legislation. We believe that it introduces very important reforms that could remedy what we believe to be a very serious problem.

Falcon breeding, specifically peregrine breeding, has been described several times today as a labor of love. Let me note, first, that there are many labors of love in this country which are not allowed on a commercial basis, and the question before us today and before this committee is whether falcon breeding, specifically peregrine breeding should be allowed on a commercial basis. That is the issue which we hope this committee will focus on, and we suggest that, because the peregrine is an endangered species, the only relevant question here is: will commercial sale for recreational or other purposes enhance the recovery of that species?

Congressman Lent's legislation, we believe, goes a long way towards remedying what we believe to be a very serious problem, and that is that the answer to the question I have raised, will sale enhance recovery, is clearly no under the current system. It is no for several reasons. The first and most obvious is that commercial sale allowed under the current law creates the wrong incentives. So long as a breeder is allowed to sell his progeny for \$2,000 to \$10,000 apiece, he obviously has a very strong incentive to do so instead of releasing those birds to the wild. In fact, the findings of Operation Falcon confirm that that incentive structure is in effect.

There is no evidence before us today that sale has, in fact, benefited the recovery effort. First, although there are many more breeders since the adoption of this provision, there are very few birds being released to the wild.

The simple increase in the number of people trying to produce birds and the number of birds they hold is nothing more than a law enforcement nightmare. Every private breeder becomes a potential conduit for illegal activity of the sort discovered in Operation Falcon. And at this moment, we have evidence that only 5 of the 65 private peregrine breeders released birds to the wild last year. At the same time, to date, 9 breeders who were trying to produce peregrines have been indicted for illegal activity. So, the problem is obvious.

The second problem we have is that the raptor exemption, by legalizing the sale of captive bred raptors, facilitates traffic in wild birds. It is obvious from the Fish and Wildlife Service testimony this morning that this is a serious problem. They have confirmed evidence, they testified, of 71 peregrines taken from the wild in the United States over the last 3 years. They also have confirmed evidence of another 40 peregrines taken from the wild in Canada over the same period. Those are very large numbers, and there is every reason to believe they are an underestimate of the actual loss since there is no reason to think that the Fish and Wildlife Service has discovered all of the illegal activity.

Those numbers dwarf the contribution of private breeders to the raptor or peregrine recovery effort.

We note here that there are very strong incentives under the current system to cheat, and the incentives go as follows. First, there is a very strong preference for wild birds in many of the consuming markets for peregrine falcons. Most notably, Mr. Berry has noted in writings of his that Middle Eastern customers are very re-

luctant to buy captive-bred peregrine or gyrfalcons. It is this preference, among others, which drives a demand for wild birds which simply cannot be satisfied by the hope that captive breeding operations will supply the need.

Second, it is very difficult to breed peregrine falcons in captivity. There were 65 breeders trying to breed peregrines last year, and there were 12 who produced peregrines. So, over 80 percent failed completely.

Finally, it is very easy to cheat and, therefore, it is very easy for a private breeder to capture wild birds, launder them through his breeding operation, and pass them off as captive bred.

These three factors combine to generate what we believe is a very serious threat to the integrity of wild populations. We note here that this situation is quite different from commercialization of other species. Although I cannot claim to know a lot about the production of alligators, I do note that, as Mr. Senner has testified, there is not in the market for alligators the same demand for wild, caught specimens as there is in the market for falcons. Second, I suspect it is easier to breed alligators, although I do not know that to be true, and, finally, we do not have for peregrines a system which is foolproof, a system which can exclude from the market wild, caught birds.

In fact, even before the seamless band was adopted, the typical modus operandi for those who want to smuggle wild peregrines or other falcons was to scoop the birds from the nest either as young eyesses or as eggs and launder them through breeding projects. Given that modus operandi, there is nothing in the seamless band that will prevent the labeling of those birds as captive-bred and their sale without fear of law enforcement. It is that problem which is the inherent weakness in the raptor exemption, and it is that problem which we believe is largely solved by the Lent bill.

The Lent bill does two things. First, it reverses the incentives by allowing sale only to recovery programs. It creates a strong incentive for private breeders to produce birds to contribute to that effort. That can only enhance the success of the recovery program.

Second, it reduces the risk of cheating. As long as the only birds that can legally be sold under the system are birds that go into recovery programs for release to the wild, at least if those birds are illegally taken from the wild, they are then returned to the wild. So, there is not the same net loss to wild populations that occurs when birds are stolen from the wild and sold for use in recreation.

For those two reasons, we believe the Lent bill goes a long way to solving the problems that we have outlined today. I note that there are several ways in which that bill, we think, could be strengthened.

Most importantly, we urge this committee to reinstate, in addition to the ban on sale, the ban on export and import of these birds and, second, the ban on transport of these birds for commercial purposes. Both of those bans are important to facilitate law enforcement efforts to ensure that wild peregrines are excluded from the commercial market.

With that conclusion, Mr. Chairman, I thank you for this opportunity to testify.

[Prepared statement of Mr. Leape follows:]

PREPARED STATEMENT OF JAMES P. LEAPE, ON BEHALF OF THE NATIONAL AUDUBON SOCIETY

Mr. Chairman and members of the Subcommittee, I am James P. Leape, Counsel for Wildlife Programs of the National Audubon Society. I appear today on behalf of the National Audubon Society to urge the Committee to strengthen the Endangered Species Act's protection of peregrine falcons by adopting H.R. 2767, or preferably, by deleting the operative language of the "Raptor Exemption" from the Endangered Species Act altogether.

The National Audubon Society was founded at the beginning of this century to work for the protection of endangered species of plants and animals, and in particular, endangered species of birds. Audubon was among the first organizations to call attention to the rapid decline of peregrine falcons as a result of DDT contamination, and we were among the first organizations to support captive propagation and re-introduction efforts by the Peregrine Fund and other facilities. Our attention today is focused on the protection of that particular endangered species, the peregrine falcon.

Over the past decade and a half, the federal government has spent more than \$14 million on programs to restore peregrine and other raptor populations. State wildlife programs and the Audubon Society have contributed thousands of additional dollars to this effort. Yet, since 1978, the peregrine falcon (the only endangered raptor used for falconry) has been denied many of the basic protections of the Endangered Species Act. A special exemption (ESA Section 9(b)(2), known as the "Raptor Exemption") provides that the prohibitions of the Act (Section 9(a)(1)),¹ which apply to all other listed species, do not apply to peregrines that were held in captivity on November 10, 1978, or to the progeny of any such birds. Most importantly, the Exemption allows the sale of captive-bred peregrines in interstate and international commerce, and has thereby facilitated substantial traffic in peregrines taken from the wild.

I am testifying today solely to ask the Committee to extend the full protections of the Endangered Species Act to the endangered peregrine falcon, by revising the Raptor Exemption. The Raptor Exemption is not contributing to the recovery of the species; to the contrary, it now appears that the Exemption threatens the species' recovery in the wild. And the Exemption is costing the Fish and Wildlife Service hundreds of thousands of dollars in efforts to control the illegal activity it has spawned and additional thousands of dollars to recover the species.

I. JUSTIFICATIONS FOR THE RAPTOR EXEMPTION

This Committee historically has opposed amendments to exempt individual species from the protections of the ESA on behalf of interested user groups, whatever the species, be it elephant, kangaroo, or leopard. The Raptor Exemption is an anomaly; it was added to the Act in 1978 at the behest of a user group, the North American Falconers Association (NAFA), with little debate. At the time the Raptor Exemption was appended to the Act, two principal justifications were provided by the falconry community. Both of these rationales have proved to be ill-founded.

A. The raptor exemption does not benefit wild peregrines.

First, the falconry community assured us that the exemption would encourage private efforts to breed peregrine falcons and thereby encourage recovery efforts.

The recovery of wild peregrine populations through captive propagation efforts started and flourished before the Raptor Exemption, under FWS permits, and such

¹ Section 9(a)(1) provides as follows:

Sec. 9. (a) General.—(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—

- (A) import any such species into, or export any such species from the United States;
- (B) take any such species within the United States or the territorial sea of the United States;
- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
- (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- (F) sell or offer for sale in interstate or foreign commerce any such species; or
- (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

efforts can continue after the Exemption is deleted or modified. However, the falconry community's contention that the Raptor Exemption "would" and "has" benefited the species by encouraging such efforts is not borne out by the facts. Simply put, it is falconers, not falcons, who have been the primary beneficiaries.

The Raptor Exemption has encouraged extraordinary numbers of falconers to try their hands at breeding peregrine falcons. But peregrine breeding is difficult, and the influx of would-be breeders, a regulatory nightmare for the Fish and Wildlife Service, has yielded little benefit to the peregrine falcon. Analyses prepared by the Fish and Wildlife Service² show that by the end of 1984, 65 private breeders (63 of whom hold falconry permits) (excluding the Peregrine Fund) had 227 peregrine falcons in their possession. The reports indicate that only 12 of these 65 breeders were successful in hatching peregrine eggs. These 12 breeders hatched a total of 172 eggs and succeeded in raising 79 peregrines.

With the purposes ascribed to the Raptor Exemption in mind, it is important to focus on the disposition of these 79 peregrines. Twenty-five (25) birds were transferred to other falconers. Twenty-two (22) were sold or bartered. Fifteen (15) were retained by the breeder. Sixteen (16) were released to the wild, through the Peregrine Fund or some other reintroduction effort. Of the 65 breeders holding peregrines for breeding purposes, only 5 breeders produced peregrines for release to the wild. Of 79 peregrines produced, only 16 were released to the wild.³ Indeed, in this regard, we note that one of the leading advocates of the Exemption in 1978, a breeding holding 17 peregrines, has not produced a single peregrine in the last three years—he has produced only hybrids for falconry.

The Peregrine Fund (non-profit and publicly funded), presents a striking contrast to these private breeding projects. In 1984, the three branches of the Peregrine Fund (in Ithaca, New York; Boise, Idaho; and Santa Cruz, California), produced 270 peregrine falcons from captive stock; at least 254 of these birds were released to the wild. The Peregrine Fund thus dominates the effort to restore peregrine populations in the wild.

These records show conclusively that private peregrine breeders are *not* making the significant contribution promised by proponents of the Raptor Exemption. Six years after the Raptor Exemption went into effect, only 16 of the 270 peregrines released to the wild were produced by the private breeders that the Exemption was supposed to encourage. The Exemption has spawned a proliferation of private breeding projects (65), but few of these (12) are productive, and even fewer (5) produce peregrines for release to the wild. Most peregrines now in captivity are being held for falconry, or in breeding projects to produce birds for falconry. Only a pittance reaches the reintroduction effort that is and must be the Act's principal objective. This record simply cannot justify the Raptor Exemption's waiver of the basic protections of the Act. As the second part of our testimony demonstrates, that waiver is costly—it allows unscrupulous falconers to enter the multi-million dollar black market in peregrines and other falcons stolen from the wild under the guise of captive propagation efforts.

B. By waiving the protections of the Endangered Species Act, the Raptor Exemption impedes the recovery of wild peregrine populations

The second contention put forward by falconers in justification of the Raptor Exemption in 1978 was that the falconry community was subject to excessive regulatory restrictions and red tape. Even though the Service was regularly authorizing permits for falconry and captive breeding activities before passage of the Raptor Exemption, the falconry community's resentment of FWS regulations and law enforcement efforts was a major theme of their testimony before the 1978 amendment. Falconers demanded regulatory relief. Leaders of the falconry community asked that Congress "remove from the Department of the Interior their regulatory prerogative in this specific area" (Endangered Species Oversight Hearings before the House Subcommittee on Fisheries and Wildlife Conservation (June 23, 1978) (Letter from Col. Richard Graham, Dr. Tom Cade, and Roger Thacker to Sen. John Culver) (p. 841)), and cut back funding for Department efforts to enforce the laws protecting falcons

²In testifying before this Committee last March, I presented Audubon's analysis of the production of private peregrine breeders. This analysis was based upon the 1984 reports filed with FWS by each breeder, and obtained by Audubon under the Freedom of Information Act. Since that time, FWS has gathered additional data and, in today's testimony, offers its own accounting of the peregrines produced by private breeding efforts. Although these statistics differ from our own in very few respects, we now rely upon them as the most definitive assessment available.

³We note here that some of these peregrines released to the wild were produced by breeders now under indictment.

(*Id.*, (Letter from Dr. Tom Cade to Robert Herbst) (pp. 837-39); Hearings before the Senate Committee on Environment and Public Works (July 28, 1977) (Statement of Roger Thacker) (p. 558)).

But in asking Congress to waive the protection of the Endangered Species Act and hamstringing law enforcement, these falconers ignore the immense public trust they hold. Some falconers receive public funds (the Peregrine Fund, for example, has received millions of dollars in federal funds since the early 1970s). More importantly, falconers and falcon breeders hold in their possession hundreds of endangered peregrine falcons, more peregrines than exist in the eastern United States, and a sizable portion of the entire North American population of the species. Thus, although falconers may resent federal scrutiny, it is certainly justified by the public interest and investment in protection of these birds. So long as peregrines remain an endangered species, the public interest in their recovery demands that those who would possess or use peregrines be strictly regulated, through the prohibitions established by the Endangered Species Act, to ensure that the public interest is not compromised.

1. *Take of peregrines from the wild.*—Application of the prohibitions of the ESA to peregrines is necessary because traffic in peregrines threatens the recovery of wild populations. Although proponents of the Raptor Exemption have argued that sale of captive-bred peregrines would relieve pressure on wild populations, in fact it has had the opposite effect. By allowing commerce in captive-bred peregrines, the Raptor Exemption facilitates illegal traffic in peregrines taken from the wild. The Exemption thus offers private peregrine breeders a powerful and often irresistible temptation to use their breeding license as cover for illegal trade in wild peregrines.

Operation Falcon in this country and parallel investigations in Canada and the United Kingdom have unveiled a vast black market. The U.S. and Canadian investigations have now documented over 100 peregrines taken from the wild in the past 3 years. In the United States, the Service has found 71 peregrines taken illegally from the wild, most subsequently disguised with bands falsely identifying them as "exempt" birds. In Canada, 40 peregrines were taken illegally from the wild and subsequently laundered through captive-breeding facilities. The U.S. investigation also revealed 19 additional peregrines subjected to illegal activities, thus a total of 130 peregrines in the United States and Canada have been documented as being used in illegal transactions, at prices reaching \$10,000 a bird.

These investigations are continuing, they are not over.⁴ Justice Department officials have said that indictments to date are "only the tip of the iceberg." Already, however, the investigation has led to the indictment of 76 falconers; 54 in the United States, and 22 in Canada. Nine (9) of these subjects are breeders-falconers engaged in captive propagation who have engaged in illegal activities. Of the 54 subjects charged to date in the U.S., 40 have been convicted and sentenced, 3 acquitted, and the remaining prosecutions are still pending.

To place matters in perspective, let me return to our earlier figures on private falcon breeders (excluding the Peregrine Fund) who are actually producing peregrines for release to the wild. There are currently 65 individuals holding peregrines in captivity; of these 65, a total of 5 breeders produced a total of 16 peregrines which were released to the wild in 1984. Operation Falcon reveals that 9 U.S. breeders, including 2 of the largest private breeders in the country are now under indictment. Obviously a substantial cloud of illegality hangs over the minimal contribution being made by private peregrine breeders at this time.

2. *Falconers use the raptor exemption to cover illegal sales.*—The Fish and Wildlife Service uses 3 types of leg bands to identify birds lawfully held under the Raptor Exemption. Operation Falcon revealed that all of these bands can be used fraudulently to cover peregrines taken from the wild for use in falconry or in interstate commerce under the Raptor Exemption. Most importantly, this investigation revealed that the seamless band, used to identify "captive-bred" peregrines for sale, can easily be used to mark birds taken from the wild. Once marked with a seamless band, wild peregrines can be sold with impunity, law enforcement officers are helpless to prove that the birds are not captive-bred.

United States and Canadian investigations have revealed that falconers bent on selling wild peregrines can easily evade most law enforcement efforts. Most often, falconers have used private breeding facilities to "launder" birds taken from the wild as eggs or eyasses (chicks) less than 2 weeks old, by marking those birds with the bands issued for identification of birds produced by the breeding facility. Al-

⁴Just this past month, the Justice Department indicted 5 more falconers, including two who are charged with trafficking peregrines.

though we have no doubt that many breeders are honest, Operation Falcon has established conclusively that a substantial number are not—so far 17 raptor breeders in the United States have been indicated in this country and Canada, including 9 breeders holding peregrines. In April, the government of Canada filed falcon trafficking charges against the largest private peregrine breeder in the United States, a falconer holding 20 peregrines.

There is no better example of how the lack of adequate regulations and prohibitions contributes to illegal activities than the Canadian experience. Canada has allowed the sale of captive-bred peregrines and other raptors for many years. Operation Falcon has revealed that the legalized sale of captive-bred falcons has spawned has spawned a thriving international black market in wild falcons. Cooperating with the U.S. Fish and Wildlife Service, the government of Canada has already indicted 22 people for trafficking raptors in Canada, and between Canada and the United States, Great Britain, West Germany, Japan, and Saudi Arabia. Two examples illustrate the magnitude of the problem:

For several years, two falconers in Cambridge, Ontario operated a breeding project under the name Birds of Prey International. These two falconers, who have already pled guilty to falcon trafficking charges, conducted a large and lucrative international trade in wild raptors, especially gyrfalcons and peregrines. In 1983 alone, they took 24 nestling gyrfalcons and 15 nestling anatum peregrines from the wild. The birds were "laundered" through several breeding projects around Canada, fraudulently banded with Canadian raptor bands, and then sold as "captive-bred." In a single year, this illicit trade grossed over \$750,000 in falcon sales, principally to buyers in Saudi Arabia.

The owners of a second breeding operation, the largest game farm in the Yukon Territories, were indicted in February. The indictment alleges that this breeding operation, which had housed the peregrine breeding project of the Yukon Territorial Government since 1980, never produced a single peregrine in captivity. During that period, however, the project "laundered" over 20 peregrine falcons (and 30 gyrfalcons) illegally taken from the wild, for sale and export as "captive-bred" birds. The Canadian Government estimates that this one breeding facility grossed over \$700,000 in sales in 1982 and 1983.

The findings of the Canadian government's investigation reveal the vulnerabilities and likely consequences of continued peregrine sales in the United States. Announcing the latest round of indictments, the government explained the workings of the falcon trade: "... The *modus operandi* in the current charges is generally as follows. A large loose-knit group of falconers and their associates have been involved in taking birds of prey from the wild, particularly in the Yukon Territory, Northwest Territories, British Columbia, Quebec, and the *western United States*. Some of these birds have been taken legally under authorized harvests, but many have been captured illegally. *Usually these birds have been taken from nests as nestlings (eyasses) or eggs.*

The illegally captured birds have generally been removed to so-called breeding facilities where they have been placed with adult birds and represented as the progeny of those adults. Wildlife officials have then been summoned to band the young birds. Finally, the operators of the breeding facilities have applied for export permits under the Export and Import Permits Act, representing to Canadian Wildlife Service representatives that the birds were captive-bred, thereby being eligible for exemption from CITES."

"Crown Submissions of Circumstances of Offences" (pp. 3-4) (emphasis added).

This *modus operandi*—the laundering of wild eggs and eyasses through captive breeding facilities—defeats the protections supposedly provided by the seamless band, the only safeguard to prevent abuse of the Raptor Exemption. Any peregrine taken from the wild as an egg or eyass can be placed in a breeding project, banded with a seamless band, and sold under the Raptor Exemption as a "captive-bred" bird—FWS law enforcement agents simply cannot prove that a bird so marked was in fact illegally taken. Wild populations thus cannot be protected.

It is already clear from Operation Falcon that falconers in the United States, in coordination with Canadians and on their own, have developed a burgeoning black market in peregrines. The Raptor Exemption facilitates this illegal trade. As long as we continue to allow the sale and trade of captive-bred peregrines, there is every reason to believe we will repeat the Canadian experience, and lose increasing numbers of our wild peregrines to the international black market.

II. REPEAL OF THE RAPTOR EXEMPTION

We therefore urge the Congress to repeal the operative language of the Raptor Exemption. More specifically, we urge the Congress to declare that all peregrine falcons, whether captive or wild, are protected by the Section 9(a)(1) of the Act. In effect, this measure would ban peregrine falcons from interstate and international commerce. This is a modest change, but we are convinced that it will not impede the recovery effort and that it will provide needed protection to the peregrine.

A. The basis for our proposal

As explained above, peregrine breeders have been exempt from the permit requirements and other restrictions of the Endangered Species Act since 1978, yet the proliferation of private peregrine breeding operations under this exemption has *not yielded any significant benefit* to the recovery effort—*altogether these private breeders contributed barely 6 percent of the peregrines released to the wild*. Some may argue that this dismal record can be blamed on Fish and Wildlife Service's delay in removing the last barrier to sale of captive-bred raptors, regulations under the Migratory Bird Treaty Act. In response, we offer two observations. First, only one of the breeders who sold peregrines last year provided peregrines for release to the wild—a breeder in Nevada provided one peregrine for release by the Peregrine Fund; that breeder is not under indictment for trafficking falcons to Canada. The prospect of sale seems to stop breeders from contributing to the recovery effort—indeed, when peregrines can be sold to falconers for \$2,000 to \$10,000, it becomes very expensive for a breeder to forego that profit by releasing his birds to the wild. Second, most breeders now trying to produce peregrines also breed raptors of other species. Those species can be sold under current regulations, and could still be sold if the Raptor Exemption is repealed. It is thus possible for breeders to recover the costs of their operations, without selling peregrines.

Banning all peregrines from interstate commerce is necessary to protect peregrines in the wild. For decades, Congress has recognized that prohibition of interstate commerce in wildlife is essential to effective protection of wild populations. Like every other major federal wildlife statute, the Endangered Species Act is based on this principle. The principle applies with special force to protection of the peregrine falcon.

As explained above, the opportunity to trade and sell peregrine falcons offers substantial potential profit to the unscrupulous. While some have claimed that captive breeding operations would satisfy the demand for peregrine, Operation Falcon has proved them wrong. Many falconers, including the Middle Eastern falconers who pay the highest prices for these birds, find captive-bred peregrines a poor substitute for peregrines taken from the wild. And, as evidenced by the eighty percent failure rate in private breeding projects, captive propagation of peregrines is very difficult. It is thus hardly surprising that there is a substantial traffic in peregrines taken from the wild.

So long as the Raptor Exemption allows the sale of captive-bred peregrines, it will be difficult if not impossible to end this traffic in wild peregrines. As Operation Falcon revealed, the leg bands used to identify captive-bred birds can too easily be used to provide a nearly perfect shield for the trade of wild birds. So long as commerce in any peregrines is legal, such devices will continue to defeat law enforcement efforts.

Simply put, it is one thing for law enforcement officers to prove that a bird was sold in interstate commerce, but quite another to establish that the bird was illegally taken and fraudulently banded. The North American Falconers Association has complained bitterly about some of the undercover techniques used in Operation Falcon. But so long as enforcement of the Act requires the Fish and Wildlife Service to prove not only that a person sold a peregrine, but also that the peregrine was taken from the wild, those techniques, difficult and distasteful as they may be, will be the only recourse for effective law enforcement.

CONCLUSION

We ask Congress to consider the exceptional difficulties the Raptor Exemption has created, and the threat it poses to the recovery of the peregrine. We suggest that there is no justification for excluding peregrines from the protections provided to all other endangered species. Falconers who wish to hold peregrine falcons should submit to the same restrictions placed on the aficionados and users of every other endangered species, ranging from tigers to parrots—the carefully constructed prohibitions of Section 9(a)(1). These prohibitions will not impede the efforts of legitimate breeders to contribute to the recovery of the peregrine. And they will help to ensure

that less scrupulous breeders do not undercut that recovery, by raiding wild populations.

The House report language for the 1978 amendment stated that "nothing in this amendment shall be construed as a diminution of the protection of wild populations of raptors under the Act." (H.R. 1625, 95th Cong., 2nd Sess. 27, reprinted in 1978 U.S. Code Cong. and Ad. News 9453, 9477). It is now clear, however, that the Raptor Exemption has in fact contributed to "a diminution of the protection of wild populations" As Representative Meyner of New Jersey forewarned during the 1978 debate, the Raptor Exemption has served "as a special interest provision that caters to those who wish to exploit the law for commercial purposes."

The Raptor Exemption has been a worthwhile experiment which in the end has proved that falconers, like the rest of us mortals, are subject to temptation and that, given the chance, some are willing to step beyond the law. It is important for the recovery of the peregrine that we no longer entertain these temptations.

Mr. BREAU. I thank all the panel members for their presentations, and we will proceed to questions.

Mr. Berry, it is Audubon testimony that 9 of the U.S. breeders of peregrines are under indictment out of a pool of 65. Doesn't that indicate a pretty serious problem?

Mr. BERRY. I am not sure, first of all, whether those statistics are correct. If that were the case, yes, I would agree. There are some bad actors out there, but I take exception to Mr. Leape's figures.

Mr. BREAU. Do you have any plans or would the association have any plans to take any action against those, or would you wait until after trial or after conviction?

Mr. BERRY. Sir, our statistics indicate that only two breeding projects have been so far indicted in this country from operation falcon, so I take strong exception to those figures. I don't know where he gets the nine people, but I have identified the two breeding projects in my statement by name, one Wayne Upton and one Tom Crestle.

Mr. BREAU. The point is, whether it is nine, or seven, or two is a legitimate area of disagreement, but the point I am trying to make, what action would the association take against any person—

Mr. BERRY. Well, we would certainly drop anybody convicted of violation:

Mr. BREAU. Drop them?

Mr. BERRY. We would certainly drop them from our rolls.

Mr. BREAU. Mr. Cade, you spoke strongly about operation falcon. Obviously, in all these operations, it is difficult to try to find the guilty party. If you don't use a sting operation, how do you find out who is not following the law in these types of operations? Isn't, in fact, a sting operation the only way you are going to discover people who are illegally trafficking in objects that cannot be sold?

Dr. CADE. First of all, let me say I agree with what Mr. Bond said about stings. I am not categorically against them if they are run properly. I would go a little bit further than he did, though, and I would insist that there be some kind of review of them other than just by the Justice Department. I think it ought to be by a court or a grand jury. There ought to be something equivalent to a warrant or a court order to permit such operations before they take place.

However, to answer your question, yes, there are many other ways in which law enforcement could be effective. One of the best ways is to have a relationship between the law enforcement agents

and the honest people who are engaged in a particular activity that they want to investigate, have such a good relationship with them that they can rely upon information that is given to them about the known or suspected cases of illegality.

As a matter of fact, North American falconers have routinely done this. It has been pointed out over and over that the most obvious, apparent crook out there was Mr. McPartlin, the stinger for the Fish and Wildlife Service, and he was reported numerous times to those folks. So, that is an indication that the honest falconers are out there trying to help.

Now, if he had been a real crook, they would have easily gotten him almost the first or second time he committed a violation. It is only because he was working for them that he was allowed to keep going for 3 years.

I have a little project going with a student in Iceland. He has been studying gyrfalcons there for the past 4 years, almost 5 years now. Of course, the Icelandic situation is somewhat different from the United States, but there the law enforcement people routinely can rely upon reports by farmers and other local people who have gyrfalcons on their property. When they see some kind of strange activity taking place, they call up their local constable and he goes out and nabs the guy in the act of taking the birds or eggs from the nest. My student has been able to help in five or six arrests.

That is what I would like to see, direct apprehension of these folks in the field where the illegalities are taking place.

Mr. BREAUX. Obviously, one of the problems is having an adequate enforcement mechanism. Audubon Society, on that point, referenced a letter they said was from you to Bob Herbst who was the Assistant Secretary for Fish, Wildlife, and Parks at the time urging him to hold back on funding for enforcement. Do you remember that? Can you tell me what the gist of that was about?

Dr. CADE. Yes; I thought that one of the ways—I was concerned that the Congress do something about this, about stings in general—and I thought that one of the ways that the Congress might be able to do something would be to cut the funding out from under such programs, and I still believe that is right. That is the way Congress has its power; it controls the purse strings.

[The following was received for the record:]

CLARIFICATION OF A RESPONSE GIVEN AT THE HEARING

My answer to Congressman Breaux's question about my letter to former Assistant Secretary of Interior of Fish, Wildlife and Parks, Robert Herbst, is somewhat confusing because I was actually thinking about more recent correspondence on the subject of appropriations for law enforcement when I spoke. I would like to clarify my answer after having re-read my letter to Secretary Herbst dated 22 December 1977, a copy of which I would also like to include in the record of this hearing since it bears so directly on all the problems we have been experiencing with the FWS Division of Law Enforcement over the years.

The point I was trying to make about appropriations in the meeting with Secretary Andrus and Assistant Secretary Herbst on 14 December 1977 at Interior was that law enforcement had been receiving a disproportionate share of funds appropriated under the Endangered Species Act relative to funds for research and management. While law enforcement is an important and necessary activity, it is—in my view—the least important function of the Fish and Wildlife Service, and its annual budgets ought to reflect that fundamental fact. Mr. Leape in his testimony for the National Audubon Society before the Subcommittee on 14 March 1985 stated that the federal government had spent more than \$14 million in the past decade and a

half "on programs to restore peregrine and other raptor populations." Only a small fraction of these millions has been spent on substantive projects involving essential research and management to conserve endangered species. The rest has been divided between administration and law enforcement.

If all the money that has been appropriated since 1973 under the Endangered Species Act for law enforcement activities involving the Peregrine Falcon had been spent instead on research and management to restore populations in nature, there would be many more falcons flying wild today, even if there had been no law enforcement at all. The restrictions placed on the use of DDT by the Environmental Protection Agency in 1972 did far more for the survival and recovery of the Peregrine Falcon than all law enforcement since the Salic law of King Gundobad of Burgundy in the 5th Century A.D.

The Peregrine Fund, INCORPORATED

for the study and preservation of falcons and other birds of prey

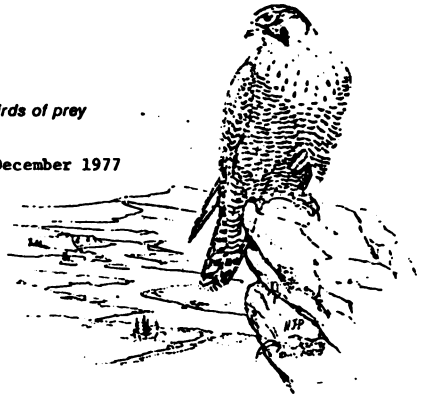
Tom J. Cade, Chm.

James D. Weaver

Robert B. Berry

Frank M. Bond

22 December 1977



The Honorable Robert L. Herbst
Assistant Secretary for Fish,
Wildlife and Parks
U. S. Department of the Interior
Washington, D. C. 20240

Dear Secretary Herbst:

I appreciate very much having had the opportunity to meet you and Mr. Harvey Nelson with Secretary Andrus on Wednesday, December 14th, and to outline some of our problems with FWS procedures and policies. There was not sufficient time toward the end of our meeting for me to explain fully our concerns over the current tactics being used by law enforcement agents, and I would like to take this opportunity to detail some of the actions and methods that we feel are excessive and discordant with acceptable American standards for law enforcement.

Our specific complaints about encounters between special agents and personnel of The Peregrine Fund have been outlined in a letter dated 22 September 1977 from Mr. Frank M. Bond to Mr. Clark R. Bavin, Chief, Division of Law Enforcement (copy enclosed). They provide examples of the generally negative, suspicious, and unhelpful attitude of most of the agents we meet in the field. My letters of 6 October 1977 and 21 November 1977 to Special Agent in Charge, J. R. Smith (copies enclosed) provide examples of our continuing problems over the issuance of permits. I am still, at this writing, technically in violation of my Special Purpose Permit, PRT 2-668 NY, which was re-issued to me on 21 October 1977, because it specifically prohibits me from keeping more than four raptors in captivity, without a written exception from the Director FWS. I hold more than 150 falcons in captivity. I do not have a written exception from the Director in hand, nor have I had any response in writing from a responsible official of FWS to repeated entreaties about this matter and others relating to permit restrictions. Consequently, I have been placed in a vulnerable position in respect to possible seizure of my birds and arrest for exceeding the authorization of my permit.

As I indicated in our discussion with Secretary Andrus, our specific problems appear to arise from a basic change in attitude and modus operandi of law enforcement agents--a change that coincided with the re-organization and enlargement of the Division of Law Enforcement that took place in 1974 during the previous administration. In the good old days when I was a young biologist working in Alaska, the law enforcement people were called "conservation officers," or some title to that effect. They were helpful

159 SAPSUCKER WOODS ROAD • ITHACA, N. Y. 14853 • (607) 256-5056

chaps who knew something about wildlife and who cooperated with biologists by banding birds, conducting wildlife population censuses, and engaging in other scientific and management practices; and--when they caught someone in the act of committing a violation--they arrested the guy.

Now they are called "special agents," and they are highly organized into thirteen semi-autonomous districts with "strike force capability in responding to the District's investigative and law enforcement needs" (Annual Report--FY 1975, U. S. Fish and Wildlife Service, page 6). According to a news release issued from The Chief, Division of Law Enforcement in 1974, many of the newly recruited FWS agents are ex-CIA, ex-FBI, ex-Secret Service agents, who have come into the Fish and Wildlife Service fresh from their Watergate experiences. Now, surveillance, infiltration, and entrapment are key operative concepts in FWS. A strong presumption of wrongdoing is no longer a requirement for initiating an investigation. Everyone is suspect, and agents spend much of their time trying to develop a potential case or in creating cases where no real evidence of a violation or intent to commit a violation exists.

The attention that the Division of Law Enforcement is directing toward citizens who have an interest in birds of prey has become truly obsessive and oppressive in the last three years. Indians who make articles with eagle feathers, scientists, falconers, breeders, taxidermists, egg-collectors, pet-dealers--it doesn't matter who you are--if you have a known interest in raptors you are automatically under suspicion by law enforcement and you are likely to be singled out for investigation. Of the eight priority objectives listed in the FY 1975 Annual Report for law enforcement under the migratory bird program (page 5), three relate specifically to birds of prey, and two others bear heavily on citizens who have an involvement with raptors. One of the major accomplishments mentioned in the FY 1975 report was the development of a master file "on all known parties interested in raptors, including all known dealers in eagle feathers or their parts." Twice in the summer of 1975 in Alaska I was asked by FWS agents to provide names of people whom I know who make trips to Alaska to rob falcon nests. At the time I thought the idea was to develop a list of "prime suspects," which I consider an entirely legitimate law enforcement procedure. But--no--the list that has been developed, at great expense to the taxpayers, is a list of everyone interested in raptors. It no doubt includes several thousand names! Such a list is an affront to the integrity of the American people.

The FY 1976 Annual Report shows the accelerated pace of law enforcement activities relating to raptors (see pages 20-22 and 91). There are many unsubstantiated and highly prejudicial allegations of large scale violations involving birds of prey, such as: "Many golden and bald eagles are deliberately taken for the commercial market that exists for their feathers and talons." "Illegal nest scooping and live-trapping of raptors for falconry occurs (sic) throughout the United States...Many such violators will resort to any means or devices necessary to steal eggs or nestlings." "The endangered peregrine falcon has become one of the most valuable gifts that anyone can offer a falconer in the Middle East. Some Americans find it very lucrative to smuggle the birds out of the country to wealthy Middle East monarchs who have paid up to \$25,000 for the birds." The Division of Law

Enforcement has deliberately built up this myth of the \$25,000 Peregrine and the rumor that there is a Mafia-like gang of smugglers, in order to justify its large budget requests under the endangered species program of the Fish and Wildlife Service. I challenge anyone to produce documented evidence that any North American peregrine has been sold for \$25,000 or that there is an organized ring of smugglers involved in trafficking peregrines to the Middle East. The Division of Law Enforcement does harm to the peregrine by publicly exaggerating its marketable value in the minds of people who are then tempted to take falcons. To be sure, some peregrines are being taken illegally, mostly by individuals who want one for themselves or for a friend who may have helped finance an illicit trapping expedition. A few may be going overseas in trade, but the small number of peregrines lost to illegal taking does not justify the large sums of money Law Enforcement gets under the endangered species program for work on this species.

"Undercover agents" are now involved in some especially disturbing activities, which are probably illegal. For one thing, they are attending scientific meetings incognito to seek incriminating evidence by listening in on innocent hallway conversations and to the reports given in the proceedings, as a means to snoop out possible cases to investigate. My Oklahoma Indian student, Bill Voelker, identified two special agents at the annual meeting of the Raptor Research Foundation, Inc. held in Phoenix in November. They apparently thought they were suitably disguised as "raptor freaks," but Voelker recognized them from previous encounters elsewhere. Other agents, I am told, spend their time reading back issues of scientific journals to see what specimens may have been described or reported that might have been taken illegally and that could lead to "opening a case" on someone.

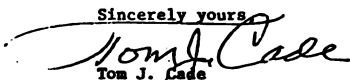
A number of agents are actively attempting to entrap citizens by offering under disguise to buy or sell feathers, specimens, and live birds of prey, especially peregrines, which carry a heavier penalty under the Endangered Species Act than do birds protected under other statutes. We have cited the case of agent Nando Mauldin in Mr. Bond's letter to Mr. Bavin. There are many other such instances. Shortly before I left to attend an international conference on falconry and conservation of birds of prey in Abu Dhabi last December, I received a telephone call from a man who identified himself as a representative of a Texas oil firm. He wanted to know how to obtain some falcons for the oil sheikhs of the U.A.E. and said cost was no concern. I referred him to the Fish and Wildlife Service for permits. Later I learned that Mr. Morlan W. Nelson of Boise, Idaho had received the same call. He did some checking and found that the company is non-existent. We now believe the man was a special agent. My Indian student, Bill Voelker, and his father, who maintain a large collection of raptor feathers, have received frequent suspect calls from parties wanting to buy eagle feathers.

Among the examples of major law violations summarized in the FY 1976 Annual Report on pages 21-22, at least two and probably three of the cases involving birds resulted from entrapment by special agents--the Texas dealer who sold two ravens to special agents; the Angelos case, which made Jack Anderson's column and which involved two Peregrines that agents took from the FWS Patuxent research program and offered for sale to a courier for Angelos (who paid \$500 for two falcons, not \$50,000); and, I guess, the man who made a down payment of \$500 for an eagle claw necklace and four golden eagle feather war bonnets.

If I read the federal laws correctly, such methods are themselves illegal! For example, the Endangered Species Act says under section 9(g) Violations: "It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section." I assume that special agents are subject to the jurisdiction of the United States. If they are, I believe the Department of the Interior has an obligation to the American people to bring to justice those agents who have violated this prohibition and similar prohibitions in other federal statutes and regulations.

I have focused on our particular problems with law enforcement and on the excessive preoccupation with people who are interested in birds of prey, but I also know that there is widespread disillusionment and dissatisfaction in the scientific and academic community generally over a variety of similar problems that have been generated by the "new mentality" of law enforcement personnel in the FWS. Both within the Fish and Wildlife Service itself and without, scientists & wildlife managers have a low regard for the negative and obstructive way they are being treated by law enforcement agents these days. It is time for someone at a high level of authority in government to correct the situation, which bodes to grow worse.

Sincerely yours,



Tom J. Cade
Professor of Ornithology and
Director, The Peregrine Fund

Encls. 3

cc: Harvey Nelson, FWS

Mr. BREAU. If inadequate enforcement is part of the problem, how do we help the problem by withholding money?

Dr. CADE. Well, I didn't want to withhold all of the money, Mr. Chairman, just the money that they were going to continue to use for sting projects. I am all for seeing other, what I consider to be better, procedures of law enforcement supported and even possibly see an increase in the number of their agents that are out there to do inspections of facilities and so on which, if they had been doing for the past 3 years, would have prevented a lot of this laundering that is reputed to have taken place.

There are ways, if an agent has had some experience in what goes on in a breeding project—and we would be glad to give them some experience at Cornell if they want to come down and find out about it—but there are things they could do to figure out rather quickly whether a guy has a legitimate breeding project or not. They haven't been doing that. They have been relying, instead, on these undercover procedures.

Mr. BREAU. Mr. Bond, let me ask you if any of the falconers who were arrested or plead guilty have had any action taken against any of them.

Mr. BOND. As I indicated in my statement, Mr. Chairman, all have been removed. The one who has not yet been removed is in the final process. He was the most recent person who either pled guilty or was convicted. A letter was sent to him. The 30-day period has passed with no response. Therefore, the next time the board meets, he will be removed, and that will be the final one.

Mr. BREAU. Your statement that you gave said that the falconry exemption has not been involved in any of the violations. I note that Mr. Berry's attachment C reveals that a number of the peregrines taken illegally were covered with the captive bred nylon bands.

Mr. BOND. That is correct, but that doesn't have to do with the falconry exemption or the raptor exemption of 1978 and its attendant regulations. And I think it brings up once again the confusion of the bands. There are three bands. There are two plastic ones, a black plastic and a yellow plastic. Then, there is the anodized aluminum seamless marker which is the cornerstone of the 1983 regulations.

The violations took place with the captive bred yellow plastic band and, rightfully, those people were charged, but that was not the cornerstone of these regulations. So, the regulations themselves were not involved.

Mr. LEAPE. Mr. Chairman, could I address that quickly?

Mr. BREAU. Yes.

Mr. LEAPE. No one can hold a peregrine falcon in this country without either a permit from the Fish and Wildlife Service or some claim to legitimacy under the raptor exemption. Now, whether the band is yellow, identifying it as captive bred, or seamless, identifying it as eligible for sale, either way, the band is issued to legitimize ownership under the raptor exemption. So, violations of that system, the raptor exemption system, are not limited to violations that involve seamless bands. They include all violations which involve bands that identify birds as legitimately held under that exemption.

Mr. BREAUX. Mr. Bond, do you have a comment on that?

Mr. BOND. Well, Mr. Chairman, I think you asked whether, in essence, the regulations were implicated, and they were not. Those bands were a result not of the raptor exemption of 1978 but the falconry regulations under 50 CFR 21.28 and the falconry standards under 50 CFR 21.29, not under 21.30 which are the captive propagation regulations.

While I would agree that there were violations absolutely of the uses of those plastic markers, it did not implicate the 1978 raptor exemption or its attendant regulations.

Mr. BREAUX. Much of the progress toward the recovery of the peregrine was made prior to the commercialization regulations. Wouldn't that recovery program be able to continue without the sale of the raptors?

Mr. BOND. Yes; it would. There is nothing in the law that would prohibit the issuance of special purpose permits by the Fish and Wildlife Service for the continued activities. But what we have seen is that with the 1978 raptor exemption, and particularly after 1983, there has been a much greater interest by people to get into captive propagation, particularly of peregrines, by virtue of the fact that commercialism would be available.

It is an expensive process. It is a labor of love. It is an expensive labor of love, and not very many people can engage in it. So, with the law as it was before the activity was limited only to the few wealthy people who were able to do it out of their own pockets.

However, more importantly, Mr. Chairman, the result has been that there have been a greatly increased number of people attempting to breed peregrines. The importance of the statistics that Mr. Leape and others indicate that only a few have been produced so far also corroborates what Mr. Berry said earlier; that many of these people, having been in it only for a couple of years, have young birds which are not yet of breeding age. Therefore, the dynamics that Mr. Berry predicts of 400 to 700 by the end of the decade have yet to be seen.

If you will look at the history of the peregrine fund, when it started in 1970, it was almost 1975 before the first peregrine was produced and released. Only in 1985 are we seeing a significant repopulation of a formerly otherwise extirpated species on the east coast of the United States. So, it takes time.

Mr. BREAUX. Perhaps either Mr. Bond or Mr. Berry can address this point. The Audubon Society in their testimony pointed out that only 16 peregrines produced by U.S. breeders outside of the peregrine fund have been released to the wild in 1984. That is not a large number. In fact, it is less than 10 percent of the captive birds. That doesn't seem to be a lot.

Mr. BERRY. Our figures show that it is 21 peregrines, and that represents 25 percent of the birds bred by private breeders in 1984. Oddly enough, there were 21 peregrines that went for conservation so far in 1985. We still have some birds that may go to conservation. There are still some eggs to hatch in 1985. Again, that represents 26 percent of the actual captive production.

You know, one thing that has been glossed over is that it costs money to breed peregrines, whether you are going to release them or give them to falconers or whatever. It costs the peregrine fund a

tremendous amount of money to breed peregrines, and these conservation groups, organizations like the Minnesota project which is supported by the Nature Conservancy, they pay as much or more for a captive bred peregrine as a falconer pays.

Mr. BREAUX. Mr. Saxton.

Mr. SAXTON. Thank you for yielding, Mr. Chairman.

Mr. Berry, your figures seem to differ on a number of points with the Fish and Wildlife figures as to not only the number of falcons released but the number of breeders, number of captive peregrine falcons. Would you be willing to share with us your records so that we could make comparisons on our own as to perhaps why some of these differences have occurred?

Mr. BERRY. Yes, sir; I certainly would. But let me explain that this is a minimum survey. I am sure there are some peregrine breeders that I am simply not aware of, probably not very many, but of the 89 breeders that we came up with, there were 11 breeders who were holding peregrine falcons for breeding as immature birds under a falconry permit which allows you to hold up to 3 peregrines. So, those 11 breeders were holding 16 peregrines, and that is some of the discrepancy, but I would be happy to pass you the information.

Mr. SAXTON. I think we would appreciate that so we could take a firsthand look at it. If you have copies today, that is fine, or you could supply them.

Mr. BERRY. I have copies with me, sir.

Mr. SAXTON. Thank you.

Mr. BREAUX. Let me ask the question, I guess of the breeders' association, that one of the points you make is that if you couldn't sell the birds to make up some of the cost of the production, you wouldn't have been able to release any to the wild without the ability to sell. Is that correct? Anybody?

Mr. BOND. Well, Mr. Chairman, I can only express for myself. It seems almost self-evident that that is the case. If you can't support the project, you can't produce the birds. If you can't produce the birds, you can't put them in the wild.

It is not unlike what you see in your own home State with the alligator circumstance that you described. You wouldn't see a great deal of captive propagation of alligators were it not for the commercial hide market.

Mr. BREAUX. Let me ask Mr. Leape, if you look over the whole operation, we see that, No. 1, taking birds from the wild is still illegal and almost 80 people got caught and something like 40 of them now have been either convicted or have pled guilty. To me, that would suggest that the enforcement program has worked, because a large number were in fact caught. Isn't that a deterrent to taking birds from the wild?

Mr. LEAPE. We certainly hope, Mr. Chairman, that that will be a deterrent. Let me say two things. First, Operation Falcon was based on what I think can be fairly characterized as a unique opportunity. That was the opportunity to infiltrate the black market in falcons through someone who was already well known as a falconer, that is, the undercover operative based in Montana. It is not, I think, safe for this committee to assume that that opportunity will present itself again on a regular basis.

Thus, there is not very strong support for the hope that continued undercover operations of the nature of Operation Falcon can serve to carry the law enforcement burden necessary to protect peregrine falcons.

Second, let me note that for those on this panel who are complaining about the techniques used in Operation Falcon, as we have noted in our testimony, those techniques are made necessary by the difficulty of enforcing these regulations.

Mr. BREUX. Well, I certainly don't buy any argument, whether it is a sting operation with birds, falcons, politicians, or any ordinary citizen, it certainly doesn't give this government the right to do anything that itself violates civil rights or the rights of the individual. They are still honest citizens until they are convicted. If they are accused or suspected of doing something illegal, that certainly does not, in my opinion, give the government the right to take action that violates their civil rights.

Now, some of the things that operation falcon did were clearly, in my opinion, and I think clearly in the opinion of Mr. Lamberton, the head of enforcement, improper and should not have been done. There is no excuse for that.

So, I don't think you can make that argument, at least, not to this member.

Mr. LEAPE. Mr. Chairman, I am not trying to defend here, in particular, the release of documents summarizing Operation Falcon to people outside the Government. I hope the committee will recognize the difficulty of that situation which is that in operations of this kind, especially at the take down stage, which is where this happened, it is important that the agents involved know what is going on so that they know what they are looking for.

No. 2, it is important, and I think everyone on this panel would agree, it is important that State wildlife agencies who share responsibility for protecting this resource also know what is going on.

That document, as far as we have been able to determine from the Fish and Wildlife Service testimony, was released only on a need to know basis, only to those people who had to know that information to carry out their responsibilities. It is certainly unfortunate that it leaked, but I don't think that can be used to impugn the entire investigation.

What I am saying is a different point, not that that leak was necessary or that that concern is unreasonable, but rather than the undercover sting operation techniques of the kind criticized by Mr. Cade, for example, are made necessary by the difficulty of enforcing these regulations. The surveillance techniques and traditional law enforcement techniques used in Iceland are made impossible by the fact that it is so easy to cheat under the current system.

Mr. BREUX. Well, I don't have objections to sting operations. They have to be very careful to carry it out. I get really upset when I see sting operations that encourage the creation or the occurrence of a crime. I think that is outside the boundary of legitimate law enforcement in this country. If it is a sting operation that merely provides the circumstances in which a crime by a person wishing to commit a crime can occur, that is a legitimate sting operation. If it goes further than that and actually encourages the creation of a crime or having someone commit a criminal act be-

cause of the encouragement of our own Government, I have real serious problems about that type of an operation.

Some of the things that happened in this operation, I think, were clearly outside the boundary of what should have been done.

What about the argument that falcons in general are recovering and why should we really get upset to the point of changing the exemption because with the exemption, we still see an increase in the population of the species?

Mr. LEAPE. Well, I don't think there is any doubt among any of the members of this panel that the peregrine falcon is still endangered in this country. Under the law, our first priority should be the recovery of that species. I think Mr. Lambertson made clear in his testimony that the illegal take of peregrines from the wild is interfering with the recovery effort, especially in those States where populations are still very small.

So long as that is the case, we believe that the mandate of the Endangered Species Act is that the first priority, both for the agency and for this Congress, should be the recovery of that species and the elimination of any threat that can reasonably be eliminated that interferes with that recovery. And we think it is clear that commercial sale is such a threat.

Mr. BREAUX. We have other waterfowl, I know, mallards and what have you, that are pen-raised regularly and are sold and are released to the wild. No one has problems with that. Is that because they are not endangered or because of some other principle that I am missing?

Mr. LEAPE. One of the things that makes this situation unique, one of the most important factors, is that this is an endangered species. One of the reasons that it is important, for example, that Congress act on this question is that, under the current law, the mandate to the Fish and Wildlife Service is, at least in effect, they should treat peregrine falcons like all other raptors, as migratory birds, and not separately as a special case which is endangered migratory birds.

So, I think that in itself distinguishes this case from the case of mallards.

The second problem we have, of course, is that there are problems posed by the protection of wild peregrine populations that are not faced in the protection of wild mallard populations such as the fact that there is in fact a demand for wild birds that captive bred birds simply cannot satisfy.

Mr. BOND. Mr. Chairman.

Mr. BREAUX. Yes.

Mr. BOND. I am not sure, at least with respect to the American falconers, that there is any tremendous demand for wild taken birds. It also ought to be pointed out, Mr. Chairman, that, to our knowledge, not a single peregrine falcon was exported through the regular export mechanism abroad last year. I don't know about this year.

Mr. BREAUX. Mr. Saxton, questions?

Mr. SAXTON. I would like to ask Mr. Bond and Mr. Cade, how would an individual who is engaged in falconry obtain a peregrine falcon if he didn't have one to breed and H.R. 2767 were to be enacted?

Mr. BOND. Mr. Chairman, if I might back up just a second, the Congressman is obviously aware that the system is a closed loop system. That is, Mr. Chairman, if the Congressman wanted to have a bird, he would have to go through the process of applying for permits, et cetera, that would finally allow him to finally have a peregrine which requires a 7-year wait through the system before you would be at a level that you could have a peregrine.

Then, with respect to actually getting one if this legislation were enacted, and assuming that some few people will continue to breed peregrines in captivity, he would have to find one of those people who would give him one.

Mr. SAXTON. So, it would be relatively difficult for an individual to become a falconer and use peregrine falcons in that pursuit if this bill were passed.

Mr. BOND. I think it would be extremely difficult. There would be only a small number of breeders, relatively speaking. Furthermore, exchange would be on a friendship basis or whatever else might convince you to give me a mallard duck or a dog that you have produced.

Mr. LEAPE. Congressman Saxton, could I just address that briefly? First, we should note that this measure would simply, in that respect, put the peregrine on the same footing as all other endangered species. It is not legal to obtain any other endangered species under the current law except with special permits or exemptions.

Secondly, we should note that there are many other birds used in falconry besides peregrines. So this, while it would limit the availability of peregrines to falconers who do not now own them, it would not limit their ability to undertake the sport.

Finally, of course, any limitations imposed by this legislation would disappear once the peregrine falcon has in fact recovered and can be taken off the endangered species list.

Mr. BOND. May I make a slight analogy? Mr. Chairman, for the Congressman's benefit, he is absolutely correct. There are other birds that falconers use. As a matter of fact, a relatively minor percentage attempt to fly peregrines. But in that respect, let's make an analogy to hunting. If you were thinking about going afield to hunt and you wanted a new 12-gauge shotgun, do you want to be limited simply to a Remington or do you want to be able to choose among all the guns that might be on the market at this stage?

That, although simplistic in approach, is what it means. There is a variety of factors that come to bear on why a person selects the kind of a bird he chooses to fly.

Dr. CADE. Could I make just one comment, too, along this line? There are populations of peregrine falcons that are not classified as endangered in the wild, and it would be at least theoretically possible for a master falconer to apply to the appropriate jurisdiction, let's say the British Columbia Government, for a permit to take a peregrine that is not endangered from the wild. So, there is that possible source available.

Mr. SAXTON. May I follow up with a question for Mr. Leape and Mr. Senner. There are other well intended and successful propagators of other types of wildlife who seem to engage in those pursuits because they have a strong interest for one reason or another, sometimes it is simply because they are a group that want the en-

dangered species or the strain or the type of animal to live and thrive in the wild for some other reason.

One good example of that is Ducks Unlimited, which I am sure you are very familiar with. In my opinion and from what I have seen, Ducks Unlimited has been so successful because there are individuals who have a vested interest in a sport, and that sport is hunting, and it helps their sport of hunting by spending their own money to propagate ducks so that duck hunting will be better in this country.

It just seems to me that there is some kind of a parallel to be drawn here. If there is no incentive for people to raise peregrine falcons, then what incentive is there for private individuals to help propagate peregrine falcons? And I realize there is a distinction to be made between ducks and falcons because ducks are not endangered, but the fact remains that private organizations have been so very successful with regard to ducks and geese because there is a strong desire on the part of private organizations to help propagate ducks and geese.

Doesn't the same principle hold for falcons as well?

Mr. LEAPE. There is nothing in this legislation which would affect or constrain those who wish to breed peregrine falcons for such purposes. The effect of this legislation is to limit their ability to sell what they produce.

Mr. SAXTON. Excuse me, but my first question was, how does one become a falconer and use peregrine falcons if we enact this law? And the answer was, and I think you tended to agree with it, at least by not disagreeing, that it was fairly difficult. It takes 7 years to receive a permit. It becomes very difficult to obtain birds. It must be by gift rather than by purchase, and doesn't that restrict the sport? As a result of restricting the sport, doesn't that provide less incentive for more people to engage in the activity of raising falcons?

Mr. LEAPE. OK. It does restrict the sport in only one respect, that is, it reduces the availability of peregrine falcons for use in the sport. It does not restrict falconry generally. I think you will find broad support for the recovery of the peregrine among all falconers and, in fact, among all bird lovers, a support that is not confined to those who are allowed to hold peregrine falcons. So, I don't think we can draw that connection.

Mr. SAXTON. Let me just suggest to you that there are lots of people who love ducks, too, but the people who paid the money to buy the land in Canada for ducks to breed on were people who wanted to hunt them, and they are the primary contributors to that fund.

Mr. LEAPE. Right, but I think under current law we would not allow them to hunt those ducks if the ducks were endangered. As a matter of fact, I am sure of that.

Mr. SAXTON. How did we get to the point where they weren't and how did geese come back? Because that organization provided the money to buy the breeding grounds for the propagation of geese and ducks. And I would argue that we are removing an incentive through this bill, through the enactment of this bill, to provide an incentive for people like those who are sitting on the panel with

you to be engaged in activities to further propagate peregrine falcons.

Mr. SENNER. Congressman, I think one point that needs to be made is that Ducks Unlimited and others who were so concerned with the welfare of waterfowl did have a vested interest, as you say. They wanted to be able to hunt ducks, but the profit motive didn't enter into that. They didn't want the recovery of ducks and geese because they were going to make money selling them.

In the case of peregrines, we have heard over and over here today that it is a labor of love and that there is an interest in propagators breeding peregrines because they, too, have a vested interest. They want to be able to fly those birds. The incentive, we believe, exists whether or not they can make a profit on selling them.

People do have peregrines. If they are successful in captive-breeding programs, they will become more widely available, and Congressman Lent's legislation would allow sales to bona fide recovery programs. The legislation doesn't say that they can't make a profit on those sales, and it may well be that they are going to be very successful in selling to the State of Minnesota, for example, and that money made in that exchange is going to help finance propagation of other peregrines.

Mr. LEAPE. Let me just add two points. The first is that what we are talking about here, I gather from your comments, is will there be some incremental increase in the number of people that hold peregrine falcons if this amendment is not enacted that would provide a stronger constituency for the recovery effort? Let me answer that in two respects. First of all, of course, there are a lot of people who now hold peregrines, and all of them, I think, can be expected to support the recovery effort.

The second thing is that those who do not hold peregrines who want to, I suggest, will be a constituency for the success of that recovery effort because it is in their interest, if they want to get a peregrine, that the recovery effort succeed and quickly so that they can once again legally obtain such a bird.

Finally, under the current system, if what we are concerned about here is the success of the recovery effort, under the current system, what you have is a lot of people trying to produce peregrines with an incidental benefit to the recovery effort. Roughly 20 percent of those finally produced go to that effort.

What you have under the Lent bill, Congressman Lent's bill, is, instead, a very strong incentive to produce birds for that effort, because that is the only way under that bill that they could legally be sold. So, I suggest that is an incentive structure which is more compatible with a successful recovery program.

Mr. BERRY. Mr. Chairman, could I make a comment?

Mr. BREAUX. Yes.

Mr. BERRY. I want to bring out a few things. We keep glossing over something, and we keep talking about all these peregrines held in captivity and limiting sales for the recovery. Probably a half a dozen peregrines that are held by private breeders could be sold, or given, or donated for any of the recovery efforts in the Western United States, because there are three subspecies of peregrines in the United States. The majority of the peregrines held by private breeders are not the endangered *Anatum* subspecies.

They are the Peels peregrine or they are mixed subspecies which are not eligible for release programs in the Western United States.

Let me make another comment. I hear over and over again that there are lots of other birds you can fly in falconry. Well, the peregrine is the premiere bird for falconry in the world, not only in the United States. It is the standard by which all other birds are measured. There is an historical demand for the peregrine which is going to continue, and it is incumbent upon us to supply that demand.

I want to touch on something that Mr. Saxton mentioned earlier. There is a new trend in wildlife management that all wildlife must pay its own way. Audubon hopes that the peregrine will recover, but the falconers are willing to put their money, and their time, and their efforts on the line to guarantee that this bird is going to recover, but they do want to be compensated for at least some of their costs.

To improve duck hunting, you know, the sportsmen go out and they buy marshes. The peregrine is no exception. The peregrine has to be able to pay its own way in this new, modern world. This is a way it can do it.

Mr. BREAUX. I don't want you all to get into the whole business of discussing it and forget about Congress up here.

Let me ask another question. Would Audubon have objections if there were a foolproof method of ensuring that all of the falcons that are in fact sold would be captive bred?

There is a problem because we don't have an identification system that apparently works and you can't tell whether the falcons are captive bred or whether they were taken from the wild. Suppose we had a foolproof method that could clearly and correctly identify all falcons that are engaged in commerce as being truly captive bred, some being released, some being sold for falconry purposes. What would your objection be to that type of a program assuming that you could accurately determine that it was truly a captive bred bird?

Mr. LEAPE. I think that our support of this legislation and opposition to the raptor exemption rests primarily on the fact that that kind of system does not now exist and does not foreseeably exist. I think there are many of our members who have difficulties on a philosophical level with the sale of migratory birds. In fact, Audubon was founded largely in opposition to the sale of migratory birds reflected in the Migratory Bird Act.

However, I think it is certainly true that the danger to the peregrine populations that we see arising from the raptor exemption arises primarily from the unavailability of such a system and the flaws in the current system.

Mr. BREAUX. All right. To those of you in the business, you heard the Fish and Wildlife Service say, look, they just have not developed a system that is certain to identify captive bred birds. People take the bands off, they put them on young birds, and you can't tell whether it is captive bred or taken from the wild.

Is there any way of improving upon that system?

Mr. BERRY. Yes, sir. Mr. Chairman, we are developing absolute techniques, and Mr. Lamberton alluded to the new footprinting technique that would prevent and absolutely identify a bird for life.

The technique requires a photograph of the tarsus of the bird showing the band number as well as the dorsal scale pattern of the foot which does not change during the life of the bird. That prevents absolutely the possibility of that bird dying and someone cutting the foot off and placing that band on another bird with a different scale pattern.

The only other area, and we are developing absolutes to combat this as well, is the laundering of either eggs or young birds into breeding projects and claiming they were captive bred. Now, I won't go into all these biological parameters, and the deterrents in the law, and the stringent reporting and recordkeeping requirements that make this virtually impossible, but we are now developing techniques where we can blood test a bird. The Fish and Wildlife Service has already used this system to disprove parentage.

Just the threat of a parental blood test tends to keep people straight. There are now, by the estimates of the people developing paternity testing at the University of Texas, about 10 to 20 percent of the peregrine populations which can now be absolutely determined to disprove parentage. Dr. Cade can give you a more scientific explanation of this new system.

Mr. BREAUX. Well, the main thing I am concerned about is if there are better techniques. I would certainly encourage the association and your people to sit down and meet with the people at Fish and Wildlife Service and work to help them develop a better system, because that is an obvious problem. Captive-breeding operations should not encourage people taking species illegally from the wild and trying to pass them off as captive bred.

You complain, legitimately in some cases, about the sting operation, but you are not going to catch someone trying to hide his illegal activities by just going up and asking them if they are doing anything criminal. You don't catch a lot of criminals that way. It is an enforcement problem, and it is a very severe one.

Mr. BOND. Mr. Chairman, we have obviously been extremely concerned about the band, the cable tie bands, the black and yellow plastic ones. The Fish and Wildlife Service in one set of their regulations acknowledged the deficiency of the band that we had been complaining of. And, as routinely said, at any point, 10 to 20 percent of the bands will be off the birds, because they bite them off.

So, we, too, absolutely welcome a better system and a foolproof system if it can be devised. We will assist and I commit the association to assisting the Department or anybody else to that end.

Mr. BREAUX. Well, —

Mr. SAXTON. Mr. Chairman.

Mr. BREAUX. Yes, Mr. Saxton.

Mr. SAXTON. Earlier today when Congresswoman Schneider was here, we had a brief discussion about the possibility of a regulation pertaining to the release of a percentage of available peregrines into the wild based on some formula.

I guess I have two parts to this question. First, since the figures that you have supplied to us don't show that private individuals have released a large number of falcons, is there a reason for that and do you expect that percentage or number to increase? Second, how do you react, as a kind of a compromise if you will, to provide for a greater number or percentage of falcons to be released to

something done through a regulatory process to provide for that kind of stipulation?

Mr. BERRY. Are you talking to me, sir?

Mr. SAXTON. Anybody who wants to respond. I might also follow up by saying if you can respond briefly, because we are going to have to go.

Mr. BERRY. I wonder whether 25 percent of the birds bred by captive breeders is not a significant number. I feel that it is. Second, a large number of birds that are privately bred wouldn't be accepted for release by the conservation agencies, because they are of a subspecies that we feel may not be genetically determined to exist in a certain location. Whether or not we would be in favor of some absolute criteria that we must release x number of birds, given the above points, I think it would be ill-advised at this point in time.

I do feel that propagation for conservation will increase—judging from the cost of peregrine falcons in this country which has decreased 25 percent in just 1 year after the first year of sales. My guess is that the conservation organizations are going to out bid the falconry community for peregrine falcons in the future.

Mr. BOND. Furthermore, Mr. Chairman, with respect to the recovery plans in place now—I am a member of the Rocky Mountain southwest team—the recovery plan itself is the first barrier to the release by propagators directly to the wild. There is a requirement that any birds that are going to be released to the wild, be released through the peregrine fund.

That may be still a good mechanism, but all the recovery plans need to be changed to go hand in hand with an amendment to the regulations that you might suggest, Mr. Chairman.

Mr. LEAPE. If I may briefly respond, three things. The first is, Mr. Berry points out that a large number of the peregrines now produced are not acceptable for release. I assume that he confines those remarks principally to the West since most of the birds being released in the East, unless I am mistaken, Dr. Cade, are subspecific hybrids or at least not pure bred anatums. But let me note that Congressman Lent's legislation would provide a powerful incentive to remedy that problem by encouraging people to produce birds of the genetic heritage required for release in recovery programs, because those would be the only birds that could be sold.

Second, let me point out that the barrier posed by recovery plans is not necessarily an insuperable one. By requiring that birds be released through established participants in that program, such as the peregrine fund, it only requires that the birds be sold or transferred to the peregrine fund for release. That is an obstacle that is routinely overcome.

Finally, let me note that just requiring that a percentage of progeny be released to the wild or provided for release does not remedy the problem which we have seen here, and that is the problem of peregrines taken from the wild and laundered through private breeding operations. It simply means that to garner the same profit, they would have to take twice as many.

Mr. BREAUX. Well, I thank everybody on the panel. I think it has been an excellent discussion.

Mr. Broberg, I didn't ask any questions because you had answered all of them in your statement. It was an excellent state-

ment. I know you and your wife's affection for the falconry business and your efforts in restoring it. It is very commendable and we are proud to have you here.

To all of you, I think that you have stated your positions very well. It has been very helpful to the committee in determining what action we are going to take on this legislation. We have heard from the Department, and we have heard from all the interested groups. This is the second real discussion of it at the congressional level. We will conclude this hearing and review the feelings of the members of the committee and determine what action to take on the legislation.

So, we thank all of you for being with us. It has been very helpful.

That will conclude this session of our committee. The committee will stand adjourned until further call of the Chair.

[Whereupon, at 12:49 p.m., the subcommittee recessed, to reconvene subject to the call of the Chair.]

[The following was received for the record:]

NORTH AMERICAN RAPTOR BREEDERS' ASSOCIATION, INC.

A Wyoming Non-Profit Corporation

Robert B. Berry, Pres.
Roger Thacker, Vice Pres.
William K. Mallon, Jr., Secy./Treas.

March 12, 1985

Honorable John B. Breux
Chairman
Subcommittee on Fisheries and Wildlife,
Conservation and the Environment
c/o Clerk of the Subcommittee
H2-544
Washington, D. C. 20515

Re: Statement of NARBA on HR 1027,
The Endangered Species Act Reauthorization

Dear Chairman Breux:

The North American Raptor Breeders' Association strongly supports the currently existing raptor "exemption" of 1978 to the Endangered Species Act of 1973, as amended. The ESA, along with the Federal Falconry Regulations of 1976 and the Raptor Propagation Regulations of 1983 provide the flexibility both to satisfy the legitimate public needs and to safeguard wild raptor populations, including *Falco peregrinus anatum*. The regulations implementing the raptor exemption establish uniform standards and procedures for the use of qualifying exempt raptors in the sport of falconry and in captive propagation, including the purchase and sale of domestically produced raptors. This statement will consider all peregrine subspecies in the U. S. because of the potential implications of the "look alike" clause in the Migratory Bird Treaty Act.

1. Significance of Private Peregrine Falcon Production

Table I. provides a clear picture of the approximate magnitude and trends in the numbers of private propagators producing peregrine falcons in the U. S. and their current and estimated production.

TABLE I

Year	<u>Numbers of Propagators</u>	<u>Peregrine Falcons Held for Breeding</u>	<u>Progeny Produced</u>
1981	20	90	46
1982		----No Data Available----	
1983	43	129	67
1984	63	167	84
1985	85	218	150 Est.

Administrative Office • 540 North Third Street • Philadelphia, Pennsylvania 19123

Honorable John B. Breux

March 12, 1985

The above figures do not include The Peregrine Fund which produced 273 peregrines in 1984. At first glance, these numbers may appear insignificant to some people, but the combined private/institutional peregrine production in 1984 was far greater than the annual production in the wild East of the Mississippi River prior to the widespread use of DDT in the 1940's.

2. Market Prices of Peregrine Falcons

Notwithstanding the prices quoted by the media and protectionist groups of \$10,000 or more for a peregrine falcon, the actual prices of domestically produced peregrines legally sold to U. S. citizens in 1983 and 1984 were modest by comparison and were roughly equivalent to the current cost of a large parrot or macaw. Table II sets forth the range of prices for peregrine falcons paid by U. S. citizens.

TABLE II

Year	Numbers Sold	Low Price	High Price	Median Price
1983*	30	\$1,500	\$3,000	\$2,000
1984**	44	\$ 400	\$3,000	\$2,000

* A single Canadian breeder, prices in Canadian dollars

** Four U. S. breeders sold 26 peregrines; balance supplied by a Canadian breeder

Prior to 1984, a single Canadian breeder maintained a monopoly in peregrine sales in the U. S. marketplace. In 1984, four additional U. S. breeders entered the marketplace. Prices are expected to drop as supplies increase to between \$500 and \$1,000 for a peregrine, which is roughly equivalent to the cost of production, excluding capital cost recovery. Many propagators are hobby breeders who are interested only in defraying or recovering operating costs.

3. Status of Raptor Propagation Regulations

The Federal Raptor Propagation Regulations of 1983, which implement provisions of the ESA Exemption, have been adopted in 11 states (Colorado, Georgia, Idaho, Kentucky, Maryland, Louisiana, Missouri, Nevada, Oregon, Utah and Wyoming). Several additional states allow purchase but not sales (California, Oklahoma, Minnesota and Montana), and at least one state has authorized sale for conservation purposes (South Dakota).

4. Benefits of Existing Federal and State Regulations

Legal sales of domestically produced exempt and non-endangered peregrines clearly benefit the species both in captivity and the wild. Table I illustrates the significant impact of the new propagation regulations on both

Honorable John B. Breux

March 12, 1985

the numbers of private propagators and peregrine falcons produced. Production is expected to increase geometrically as currently held breeding stock reaches sexual maturity and as new propagators gain practical experience. Legal sales have created an incentive for breeders to exchange valuable breeding stock, which will enhance genetic diversity, contributing to the welfare of an expanding captive population (The North American Peregrine Foundation, Inc., has funded an International Raptor Registration in recognition of the critical need to maintain pedigree records on captive-bred raptors).

The actual and expected increases in domestic peregrine production will benefit wild peregrine populations, especially the anatum peregrine which is a local resident of Rocky Mountain and Pacific Coast states. The increasing availability of captive-bred peregrines, along with strong legal and factual deterrents to illegal activities, will reduce the temptation of illegal harvest and defuse any potential black market operations.

5. Operation Falcon and the Propagation Regulations

The federal "sting" entitled "Operation Falcon" has delayed adoption of the new propagation regulations even though these regulations have not yet been involved in any indictments, or implicated in any affidavits for search or seizure, or in any of the government informant's notes. In fact, the new regulations were designed to alleviate the need for sting-type operations by providing a legal source of birds to the falconry community not otherwise available. Nevertheless, many state governments have delayed adoption of these regulations because of the continuing nature of Operation Falcon and advice from the Fish and Wildlife Service (Idaho adopted in January 1985 despite negative testimony from a federal wildlife agent. It is unlikely that the propagation regulations are involved in illegal activities. Only six states (Colorado, Georgia, Louisiana, Oregon, Utah and Wyoming) had implemented the new regulations in time to affect the 1984 raptor breeding season. Of even greater significance, only seven propagators sold raptors under the new regulations in 1984, and only four of these individuals sold peregrine falcons. Certainly, these regulations, which evolved over an 8-year period and represented a majority of informed opinion, have not been adequately tested. We question both the wisdom and propriety of the Service's premature review of these regulations (Federal Register/Vol. 50, No. 3, Friday, Jan. 4, 1985, and Vol. 50, No. 23, Monday, Feb. 4, 1985), which review is allegedly justified by Operation Falcon.

In our opinion, sting operations like Operation Falcon are only able to proliferate in an artificially regulated climate which unduly restricts or prohibits free market mechanisms. It is not altogether inappropriate to compare the intolerable legal climate which existed during the days of alcohol prohibition with the situation forced upon the falconry community

Honorable John B. Breux

March 12, 1985

by the ESA of 1973 which prohibited access to wild populations of the premier bird for classical falconry. The raptor exemption of 1978 and the new raptor propagation regulations of 1983 were designed to alleviate this potential problem.

6. Conclusion

The falconry community has assumed a leadership position in raptor conservation for several decades and has pioneered a variety of programs to help guarantee the survival of all raptorial species, including publicity and public relations to halt persecution, raptor rehabilitation, prevention of electrocution, pesticide abatement, captive propagation and reintroduction of threatened and endangered species, to mention a few. Falconers are directly responsible for the strict federal falconry regulations designed to discourage all but the truly dedicated sportsmen. Falconers championed the raptor exemption to the ESA to facilitate reintroduction of the peregrine in the U. S. and to guarantee the existence of a viable captive population should another environmental catastrophe threaten the chemically sensitive wild population. Falconers supported the concept of legal sales of domestically produced raptors as a means to encourage captive propagation within the framework of existing regulations. Alternate scenarios, including a declaration of private property, were rejected because the community felt incapable of assessing possible deleterious effects on wild raptor populations.

Our existing raptor laws are not perfect and will continue to evolve over time as new data is gathered. Nevertheless, we have a firm base upon which to develop model laws where the legitimate rights of our citizens complement biological parameters insuring the survival of wild ecosystems. The falconry community has demonstrated its dedication, commitment and competence to justify its stewardship role as a major benefactor to our raptor resource. We respectfully request the continued support of the Congress to help us fulfill this obligation.

We appreciate the opportunity to present this statement to the Committee. Please print this statement in its entirety in the proceedings of this hearing.

Very truly yours,

Robert B. Berry
Robert B. Berry
President

eml

Gene Johnson
4752 Crimson Circle South
Colorado Springs, CO 80917

April 29, 1985

John B. Breauz, LA, Chairman

Subcommittee on Fisheries and
Wildlife Conservation and the Environment
Room H2-544, House Office Building, Annex No. 2
Washington, DC

Dear Subcommittee Members:

As a falconer for over twenty years with a wildlife management background (BS OSU 70), I urge you to reauthorize the Endangered Species Act as is, with the exemption for peregrines.

Falconers are primarily responsible for the research that led to the successful captive breeding of raptors with their subsequent reintroduction programs. Falconers have earned, through this significant contribution, the right to be able to fly all races of peregrines and breed them privately for falconry and reintroduction purposes.

Sales of these captive bred birds should continue to maintain an equitable means of distribution to qualified individuals in a society based on free enterprise. Under the current patronage system (or "give with no strings"), there is a great potential for influence to be bought with birds or birds being doled out relative to the size of donation. I believe these conditions act to limit competition and reduce production of this rare resource. In our democracy, criteria for distribution of these birds should be based on a person's qualifications under our permit system. This factor will act as a limiting element to insure fair and equitable distribution of these raptors. I believe a limited harvest of tundra falcons by falconers will further preclude illegal activity.

Thank you for your consideration.

Sincerely,



Gene Johnson



COLORADO HAWKING CLUB

P. O. Box 25427, Colorado Springs, Colorado 80936-5427

April 29, 1985

John B. Breaux, Chairman
 Subcommittee on Fisheries and
 Wildlife Conservation and the Environment
 Room H2-544, House Office Building, Annex No. 2
 Washington, DC 20000

Dear Chairman Breaux:

The Directors of the Colorado Hawking Club unanimously support reauthorization of the Endangered Species Act as is, with the exemption for peregrines.

Falconers originated the methods and technology by which the peregrine falcon and other raptors are being bred around the world. Falconers consider the peregrine falcon's survival of utmost importance and are proud to contribute much time, effort, and expense to insure this goal. It is only fitting that falconers be allowed to fly peregrines, breed them, and distribute them to qualified individuals with limited government involvement.

The charges leveled at falconers by the National Audubon Society as a result of 'Operation Falcon' are inaccurate. Most violations of the raptor laws were initiated and perpetrated by The U S Fish and Wildlife Service in what the falconry community views as an attempt to discredit and disenfranchise falconers. The USF&WS' allegations of a US falcon black market remains unsubstantiated.

The leadership of the Colorado Hawking Club urges you to consider the biological facts and sound wildlife management principles that favor the practice of falconry. Please do not allow the emotional speculations of a misinformed protectionist element influence you to limit our art and sport of thousands of years.

Thank you for your consideration.

Sincerely,

The Officers and Directors of the Colorado Hawking Club:

Lee Grater, President
 Harold M. Webster Jr., Director at Large
 Guy Boyd, Northern Director
 Lou Pendleton, Central Director
 Gene Johnson, Southern Director

Lisa Johnson
 submitted by Lisa Johnson, Co-Secretary, CHC
 4/29/85

cc: Officers and Directors - CHC
 Joél Allen, Co-Secretary - CHC

DEDICATED TO THE PRESERVATION OF AN ANCIENT ART IN A MODERN WORLD



NEW YORK CITY AUDUBON SOCIETY

10 May 1985

71 WEST 23 STREET, SUITE 1828, NEW YORK, NEW YORK 10010, 212 691-7483

The Honorable Bill Green
U.S. House of Representatives
Washington, DC 20515

Dear Representative Green,

I am writing on behalf of the 8000 members of the New York City Audubon Society to urge you to support renewal of the Endangered Species Act. We also seek your support of measures which would: provide full protection to the endangered peregrine falcon; increase protection of endangered plants; and increase funding for the Act. We also call on your help to defeat efforts which would lead to hunting of certain endangered species and limit the Act's reauthorization to one year.

We urge you to extend to peregrine falcons the protection now provided to all other endangered species under the Act which bans interstate commerce in all endangered species, except for the peregrine falcon. The present Act allows for the transport and sale of "captive-bred" peregrine falcons in order to subsidize private breeders and encourage them to produce peregrines for return to the wild. The effect of this exemption has been minimal. Last year, the 45 private breeders produced only 13 peregrines for release into the wild, while the Peregrine Fund (funded by charitable and government contributions) produced 254 peregrines for release. In fact, the exemption encourages the taking of wild birds and passing them off as captive-bred (a Fish and Wildlife Service investigation underway has produced evidence of 60 birds illegally taken from the wild) and makes enforcement nearly impossible because successful prosecution hinges on proving that the birds were in fact taken illegally from the wild — not bred in captivity. Again, we urge that peregrines receive the full protection accorded other wildlife species under the Act, and thereby enhance their chance for recovery in the wild.

We are also opposed to the suggestion of western water interests to limit the Act's reauthorization to one year. These interests are pressing for a one-year renewal to await the recommendations of the "Upper Colorado River Basin Coordinating Committee", which is considering changes in the Act's implementation as well as possible amendments to the Act. Unfortunately, the Committee will not examine the archaic western water law and its deleterious effects on wildlife. We are vehemently opposed to limiting the Act's renewal to one year. Such a request is unjustified, especially in view of the Act's 12-year history, during which the Fish and Wildlife Service bent over backwards to ensure that the Act did not interfere with any water development projects — notwithstanding the impacts on endangered species. This has been especially detrimental to endangered species of fish and birds, such as the whooping crane, which require adequate stream flow to maintain their habitats. The damming of western rivers has resulted in changes in stream flow which has rendered the habitat unsuitable and contributed to serious species declines. In Nebraska's Platte River, for example, diminished water flows have narrowed the river channel and eliminated sandbars formerly used by whooping cranes. What needs serious reevaluation now is not the Act, but the archaic western water rights law.

We understand as well that some state fish and game agencies have requested amendments which would lead to more hunting of threatened species, in particular the wolf in Minnesota and the grizzly bear in Montana. We strongly oppose such amendments and urge you to do so. Such amendments may be offered in response to the court decision -- under fire from game and fishing interests -- which ruled that the Secretary of Interior may not authorize sport hunting of the wolf in Minnesota (where it is a threatened species). The decision still allows the Secretary to authorize the taking of predating and depredating animals in order to protect life and property. It also does not limit the Secretary's discretion with respect to "experimental populations." The court's decision will have virtually no impact on hunting in the U.S., because most hunted species do not face the threat of extinction within the foreseeable future. However, the Act does permit the hunting of a threatened species -- not as an objective of its conservation, but rather as a means, in very limited circumstances, of securing its conservation. It is for precisely these compelling reasons that we oppose any amendments which would thwart the sound logic of the original Act and lead to the hunting of threatened species.

We are also concerned that the protection accorded to endangered animal species be extended to endangered plant species. This could be accomplished by prohibiting the removal of endangered plant species from non-federal and other private property without the formal consent of the landowner and prohibiting the malicious destruction of protected plants on federal lands.

Lastly, but most important, we urge you to support increased funding for the Act. Increased funding would enable the Fish and Wildlife Service to expedite listing of endangered species (currently 1000 species are recommended for listing but continue to be threatened while awaiting the listing which occurs at the rate of 40 species per year); allow the implementation of measures to conserve listed species, such as acquisition of habitat; and allow the Act to address the largest portion of species loss -- the loss of thousands of species in the tropical rainforests and other ecosystems outside of the U.S. The funding level of Act could be doubled for less than half the price of a single MX missile. While we realize fully the present budgetary situation, the U.S. should not address present needs at the expense of needs which may seem less readily apparent now but are equally important. What is needed now is the kind of vision that led Congress in the depths of the Great Depression to set aside substantial funds for the purpose of game conservation. We call on you to help others have that same visionary foresight now.

We, your constituents, urge you to adopt these measures when the Act comes up for reauthorization and ensure that the Act fulfill its original intent -- provide full protection for endangered plant and animal species. We look forward to hearing from you that you will be supporting the measures we have urged. We will be contacting you shortly to see how we can best follow up on our concerns. Thank you.

Sincerely,

Janet E. Sharke

Janet E. Sharke
Conservation Committee



MAY 13 1985

NATIONAL WILDLIFE FEDERATION, 1412 Sixteenth Street, N.W., Washington, D.C. 20036 (202) 797-6800

Office of the Executive Vice President

May 10, 1985

The Honorable John B. Breaux, Chairman
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
2113 Rayburn House Office Building
Washington, DC 20515

John
Dear Mr. Chairman:

I am writing on behalf of the National Wildlife Federation to ask for your support of an amendment to the Endangered Species Act to ban commercial trade in threatened and endangered raptors. Approval of such a change in the "Raptor Exemption" (Section 9(b)(2)) by the Committee on Merchant Marine and Fisheries on Tuesday, May 14, 1985 would improve protection for peregrine falcons. Prohibiting commercial trade in these birds would not interfere with the use of legally held peregrines in falconry nor would it limit sale of peregrine falcons to state and federal governments for conservation purposes.

The National Wildlife Federation supports falconry and the efforts falconers make to aid the recovery of these endangered raptors. I firmly believe that ending commercial trade in these birds is consistent with this position. I hope you will agree.

Sincerely,

Jay

JAY D. HAIR

JDB:bd

BRUCE BABBITT, Governor

Commissioners:
 CURTIS A. JENNINGS, Butte, Chairman
 W. LYNN MONTGOMERY, Flagstaff
 FRED S. BAUER, Bp.
 LARRY D. ADAMS, Tempe City
 FRANCIS W. TOWNE, Tucson

Director
 BUD BRISTOW

Assistant Director, Service
 ROBERT J. GRUBENWALD
 Assistant Director, Operations
 DUANE L. SHOLPE



ARIZONA GAME & FISH DEPARTMENT

2222 West Johnny Road, Phoenix, Arizona 85023 942-3000

July 8, 1985

RECEIVED

JUL 11 1985

Walter B. Jones, Chairman
 Committee on Merchant Marine & Fisheries
 Room 1334
 Longworth House Office Building
 Washington, D.C. 20515

COMMITTEE ON MERCHANT MARINE
 AND FISHERIES

Dear Walter Jones:

The House Committee on Merchant Marine and Fisheries is now considering reauthorization of the Endangered Species Act. In the course of hearings scheduled for July 10, the issue of sale of captive-bred peregrine falcons will be addressed by the Committee. We urge you to consider strongly revocation of any authorization for such sale if it cannot be unequivocally assured that it will not cause further legal or illegal take of peregrines from the wild. It is our strong belief, as evidenced by Operation Falcon and similar situations in the past, that this cannot be reasonably, let alone unequivocally, assured.

Thank you for consideration of these comments. If we can provide any further assistance, please contact us.

Sincerely,

Bud Bristow
 Bud Bristow
 Director

BB:TEJ:rp

cc: John Breau

318 Montford Avenue
Mill Valley, CA 94941
July 21, 1985

The Honorable John B. Breaux, Chairman
Subcommittee on Fisheries and Wildlife, Conservation and the Environment
House Committee on Merchant Marine and Fisheries
Room H2-544, House Office Building, Annex No. 2
Washington, D.C. 20515

Dear Congressr n Breaux,

The attached comments are submitted for the record of the hearings held July 10 on H.R. 2767, Legislation to Amend Endangered Species Act Regarding the Sale in Interstate Commerce of Certain Captive Raptors. Over the past year I have spent much time researching the facts concerning Operation Falcon, and I believe I have collected and analyzed more information on the subject than any other single individual outside the government. The purpose of these comments is to point out errors of fact in the written statement submitted to the Committee by the Audubon Society's Mr. James P. Leape in advance of the hearing, errors that cast serious doubt on the validity of any of his conclusions.

I am an engineer by profession. I am also Editor of the North American Falconers Association's internal publication Hawk Chaik, but I am submitting these comments as an individual, not as a representative of the Falconers Association.

Very truly yours,

William R. Shor
William R. Shor

IMPORTANT ERRORS OF FACT FOUND IN THE STATEMENT MADE JULY 10, 1985
BY MR. JAMES P. LEAPE FOR THE NATIONAL AUDUBON SOCIETY ON THE RAPTOR EXEMPTION

SUBMITTED BY WILLISTON SHOR
318 MONTFORD AVENUE
MILL VALLEY, CALIFORNIA 94941

Audubon: "Thus a total of 130 peregrines in the United States and Canada have been documented as being used in illegal transactions, at prices reaching \$10,000 a bird." At another point in the testimony, "It is thus hardly surprising that there is a substantial traffic in peregrines taken from the wild."

Correction: These statements that indicate a large number of peregrines were bought and sold in the U. S. are not supported by the written testimony of Mr. Ronald E. Lambertson of the Fish and Wildlife Service. Lambertson told the Committee, "There was a total of 90 separate peregrine falcons involved in illegal activities in the United States." (Underlining added.) He did not say they were sold, and the information in the indictments, Rule 11 statements, plea agreements and affidavits supporting search warrants (as demonstrated in Mr. Robert B. Berry's testimony before this Committee on July 10) alleges the sale in the U.S. of only 16 peregrines, and the evidence on 6 of the 16 is from a German smuggler with a very poor reputation for truthfulness. Furthermore, there is no evidence in those documents of any peregrine sold illegally for anything like \$10,000 in the U.S.; most were allegedly sold for \$1,000 or less.

Audubon: "U.S. and Canadian investigations have revealed that falconers bent on selling wild peregrines can easily evade most law enforcement efforts. Most often, falconers have used private facilities to 'launder' birds taken from the wild as eggs or eyasses (chicks) less than 2 weeks old, by marking those birds with the bands issued for identification by the breeding facility."

Correction: As can be seen from Appendix C to Mr. Robert B. Berry's testimony, the documents listed under the preceding item allege only 10 peregrine nestlings taken illegally in the U.S. during the period of the sting, and allege only 3 of them to have been sold. Those 3 were sold by the FWS informant. This hardly supports the broad generalization by Audubon so far as the U.S. is concerned.

Audubon: "For several years, two falconers in Cambridge, Ontario operated a breeding project under the name Birds of Prey International. These two falconers, who have already pled guilty to falcon trafficking charges, conducted a large and lucrative international trade in wild raptors, especially gyrfalcons and peregrines...In a single year, this illicit trade grossed over \$750,000 in falcon sales, principally to buyers in Saudi Arabia."

Correction: To check the accuracy of this statement, which Audubon had made earlier in a Senate subcommittee hearing, I telephoned Mr. David Stone, Crown Attorney in charge of all the Canadian Operation Falcon cases, on May 21, 1985. He said that the amount grossed was about \$720,000 over two years (rather than \$750,000 in a single year), and included legal sales as well as illegal ones; he also said only one of the accused had pleaded guilty and the other still awaited trial.

Audubon: "The owners of a second breeding operation, the largest game farm in the Yukon Territories, were indicted in February...The Canadian Government estimates that this one breeding facility grossed over \$700,000 in sales in 1982 and 1983."

Correction: In the conversation cited above the Crown Prosecutor said that this estimate of \$700,000 in sales was news to him, and that while Audubon attributed it to the Yukon game farm it was probably a near repeat of the figure that the Canadian government attributed to the two defendants already mentioned from Cambridge, Ontario. Thus it is evident that because of errors, Audubon has greatly exaggerated the amount of illegal sales reported in Canada.

Audubon: "Indeed, when peregrines can be sold to falconers for \$2,000 to \$10,000, it becomes very expensive for a breeder to forego that profit by releasing his birds to the wild."

Correction: Robert B. Berry's testimony demonstrates that the prices referred to are greatly exaggerated. They could not be otherwise, because a major Canadian breeder was legally selling female peregrine falcons to Americans for \$3200 and males for \$1600 this year. His competition all by itself would prevent prices of \$10,000.

Audubon: "Many falconers, including the Middle Eastern falconers who pay the highest prices for these birds, find captive-bred peregrines a poor substitute for peregrines taken from the wild."

Correction: The reasons Middle Eastern falconers have little use for captive-bred peregrines apply equally to those taken from the wild as nestlings. Those birds have not developed the hunting skills or the strength on the wing possessed by birds that have already hunted on their own. It takes substantial time and effort for falconers to give birds taken as nestlings the necessary conditioning, something not part of the tradition of Middle Eastern falconers. Therefore, a wild peregrine nestling laundered through a breeding project is no more desirable to the Arab than a captive-bred bird. What the Middle Eastern falconers much prefer (when they want peregrines at all) are birds caught on their first southward migration. They are able to buy such birds legally in Pakistan and elsewhere in the Middle East.

The limited scope of these comments should not be taken as agreement that the remainder of Audubon's statement is correct. The items selected for comment here are those that appear to be the basis for many of Audubon's conclusions. Since the "facts" used to support those conclusions are wrong, it is hardly likely that the conclusions themselves are valid.

99TH CONGRESS
1ST SESSION

H. R. 2767

To amend the Endangered Species Act of 1973 regarding the sale in interstate or foreign commerce of certain captive raptors.

IN THE HOUSE OF REPRESENTATIVES

JUNE 13, 1985

Mr. LENT introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To amend the Endangered Species Act of 1973 regarding the sale in interstate or foreign commerce of certain captive raptors.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That paragraph (2) of section 9(b) of the Endangered Species
4 Act of 1973 (16 U.S.C. 1538) is amended—

5 (1) by striking out “The” in subparagraph (A) and
6 inserting in lieu thereof “Except as provided in sub-
7 paragraph (C), the”; and

8 (2) by inserting after subparagraph (B) the follow-
9 ing new subparagraph:

1 “(C) Subsection (a)(1)(F) applies to any sale in interstate
2 or foreign commerce of any raptor described in subparagraph
3 (A)(i) or (ii), except the sale of any such raptor to (i) a Feder-
4 al or State agency for use in a raptor recovery program ap-
5 proved by the Secretary, or (ii) a private entity for purposes
6 of participation by that entity, under permit issued by the
7 Secretary, in such a program.”.

